

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 11,335

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA/CIRCUIT

*For the
District of Columbia Circuit*

ABRAM E. STERN, *Appellant*,

v.

THE STERN COMPANY OF WASHINGTON, D. C., ET AL.,
Appellees.

Appeal from the United States District Court
for the District of Columbia

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QUESTIONS PRESENTED

In the opinion of the appellees, the questions presented are:

1. In arbitration and award, can the courts review the findings of fact and of law of the arbitrator, or substitute their judgment for that of the arbitrator?

2. Can an award of an arbitrator be set aside on any other grounds than those specified in the statute?

3. After a party to an arbitration proceeding has obtained knowledge of the incompetency of the arbitrator or of an irregularity by him, does such party waive the right to complain thereof by appearing and proceeding before the arbitrator without complaint?

4. When the finding of the arbitrator is one of mixed question of law and fact, does a party to the arbitration have to show the court a distinct error of law before the award can be set aside?

5. Can a general agent of a corporation assign all of the assets in a single transaction, in the absence of authority so to do?

6. Where a party to an accounting keeps books and records in such manner as to render an account impossible, (a) will such conduct commend him to the favor of a court of equity, (b) should every doubt and difficulty in the accounting be resolved against such party?

7. Where facts pro and con are presented to an arbitrator, can a court set aside the finding of fact of the arbitrator?

8. Where a litigant did not raise the question of the form of the award in the trial court, where the same could

have been corrected, can he raise it for the first time in this court?

9. Where one proceeds with an arbitration hearing with knowledge of facts indicating bias on the part of the arbitrator, does such party waive the disqualification of the arbitrator?

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,335

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v.

THE STERN COMPANY OF WASHINGTON, D. C., ET AL.,
Appellees.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES

COUNTER-STATEMENT OF THE CASE

Appellant's "Supplemental Statement of The Case" appearing at pages 2 to 7 of his brief undertakes to state matters of fact. However, a check of the references to the joint appendix shows that the statements, made as facts, are merely counsels' conclusions either as to the facts alleged in the pleadings in this case or as set forth in the Referee's Award.

The Appellees agree that the appellant Abram E. Stern "filed a Bill for Receiver" for the Stern Company of Washington, D. C., a corporation, in the lower court, "naming his brother, Hymen Stern, his sister, Celia Stern," and the corporation, as defendants (App'l't. Br. 2); that "Hymen and Celia Stern filed an answer to the Bill for Receiver and also filed a Counterclaim and Cross-Claim demanding an accounting from Abram Stern for his management of the corporation and its assets." (App'l't. Br. 4); that "by stipulation of the parties" and "by an order of the Court", a "reference" of the case "was made to Hyman Goldman, (as referee), under Title 16, Section 1701, et seq., D. C. Code, 1951 Edition, with full power and authority to hear and to determine the issues of law and fact involved in this cause." (App'l't. Br. 4-5).

The Referee heard some 44 witnesses, the testimony covering 19 volumes (73A). He decided that the application for receivership should be denied, (74A); that A. Edwin Stern, Jr., Frances Koven, Adele Stern and Hanna R. Alexander had no claims against the corporation, (76A-79A); that Hymen Stern owed the corporation \$5,000, (79A); that the corporation owed Celia Stern \$6,700, (79A); that Abram E. Stern owed the corporation \$32,836.35 and said Stern was ordered to turn over certain notes and conditional sales contracts to the corporation. (80A-84A).

Abram E. Stern filed a motion to set aside the award, (85A), which was denied, (89A-91A). Judgment was entered in accordance with the award (92A-93A) and Abram E. Stern appealed. (93A)

The case before the Court is one solely of arbitration and award.

The law applicable to such cases is quite different than the law applicable to ordinary trials. It is pointed out

under our heading "Argument" that where cases are heard by an arbitrator (called a referee in our statute), by agreement of the parties, the award of the arbitrator can be vacated or set aside only on the grounds set forth in the statute.

The facts of this case are set forth, where deemed necessary in the light of the particular error claimed by the appellant. To do otherwise would unnecessarily lengthen this brief.

ADDITIONAL STATUTES INVOLVED

§ 16-1707, D.C. Code, 1951:

On motion filed within twenty days after notice of the filing of the award to the parties or their attorneys, the court may set aside his award because of corruption or misconduct of the referee, or because he exceeded his powers or so imperfectly executed them that a final award was not made, or may modify his award in case of an evident miscalculation of figures, or if it relates to matter not submitted, or is imperfect in form.

SUMMARY OF ARGUMENT

Arbitration and award was known to the common law. Where parties to a dispute agreed to entrust the law and the facts of their dispute to an arbitrator, the parties were bound by the findings of fact and conclusions of law made by the arbitrator, in the absence of fraud, or mistake apparent on the face of the record. In order to provide an easier way for enforcement of the award, statutes were enacted providing for such enforcement by rule of court and contempt. These statutes also provided a manner in which the award could be set aside. The courts have consistently held that an arbitrator's award

can be set aside only on the grounds provided by statute; that when an award finds facts it is conclusive; that when the award makes a concrete conclusion of law, unmixed with fact, the mistake may be corrected by the Court; that when the award is a mixed conclusion of law and fact, the error of law must be distinctly shown, otherwise, the parties must abide the award.

Our present statute provides that an award may be set aside because of (1) corruption or misconduct of the referee (the arbitrator), (2) the referee exceeded his powers and (3) the referee executed his powers so imperfectly that a final award was not made. It also provides that an award may be modified (1) for evident miscalculation of figures, (2) if the award relates to matters not submitted and (3) if it is imperfect in form. (§ 16-1707, D.C. Code, 1951, Additional Statute Involved).

The award of the arbitrator or referee may be set aside or modified only on the grounds set forth in this statute.

Where a party to arbitration has knowledge of the corruption or misconduct of the arbitrator or of any irregularity in the proceedings, such party, by appearing and proceeding before the arbitrator waives and loses his right to avail himself of the objection to the validity of the award.

A general agent charged with the management of a corporation is not authorized to dispose of the entire property of the corporation in a single transaction.

Where the manner in which books of account are kept renders an account impossible, every doubt and difficulty should be resolved against the party keeping the books.

Where there is evidence to support the award, the findings of fact of the arbitrator are conclusive.

The appellant objects to the form of the arbitrator's award in this Court. He did not do so in the trial court. He cannot validly raise such objection now. Under § 16-1707, the appellant is entitled to modification of the award when it is imperfect in form. He is not entitled to have the award set aside on that ground.

The general rule is that one who proceeds with an arbitration with knowledge of facts indicating bias on the part of the arbitrator, waives the disqualification and may not thereafter use it as a basis for setting aside the award. Where the question of appointing a Receiver for a corporation is submitted to an arbitrator and he finds, as a fact, that there is no evidence warranting the appointment of a receiver, such finding is conclusive. When the appellant agreed to submit the determination of all issues of law and fact to the arbitrator, he agreed to abide the award unless it could be set aside or vacated on the grounds provided in the Code. Under the Arbitration Statute, this Court is precluded from exercising its general equity powers which appellant now invokes and which action would be in contravention of § 16-1707.

ARGUMENT

Arbitration at Common Law and Under Statute

Arbitration is the outgrowth of the practice of business men to avoid public tribunals and to settle their disputes before individuals of their own choosing. A brief discussion of the common law and statutory practice and procedure is deemed pertinent in order that the Court may appreciate the sharp differences in setting aside a decree or judgment on the one hand and in setting aside the award of an arbitrator on the other, as well as the finality of an arbitrator's findings of fact and conclusions

of law in contradistinction to those of a master or ordinary referee.

Originally, the parties to a dispute would agree to submit their differences, both fact and law, to arbitrators of their own choosing. The award of the arbitrators was impeachable by way of a caveat or an action to set it aside. The only grounds therefor were fraud and mistake. Questions of fact and questions of mixed law and fact, decided by the arbitrator, could not be disturbed. Concrete propositions of law, unmixed with fact, as well as mistake apparent on the face of the record, as when the arbitrator clearly exceeded the power conferred by the agreement of submission and such as errors in computations, were grounds for setting aside the award.

The award was enforceable only by appropriate action such as debt, assumpsit on the agreement and award, debt on the bond for performance of the award, or by specific performance.

In 1698, the Statute of 9 & 10 William III, Cap. 15, (Alexander's Br. Stat. 838), first provided a means of bringing arbitration matters under the control of the courts, at the beginning of the controversy. Section I of that act provided that the parties to any controversy, suit or quarrel, could agree to arbitration. Upon such agreement to arbitrate, a rule of court was made whereby it was provided that the award of the arbitrator could be enforced by a rule for contempt, which could not be stopped unless the arbitrator had misbehaved himself and the award was procured by corruption or other undue means.

Section II of that Act provided that the award could be set aside if it was procured by corruption or undue means.

In 1778, the legislature of Maryland passed an Act which provided that any cause instituted in any court in that State could, by rule of court and consent and agreement of the parties, be submitted to arbitration and award, and the court could give judgment on the award. The grounds for setting aside the award were that the award was obtained by fraud or malpractice, or by surprise, imposition or deception of the arbitrators or without due notice to the parties or their attorneys. (Kilty, Act of Oct., 1778, Ch. 21, Secs. 8 and 9; Code, Art. 7.)

The grounds for setting aside the award, as provided by Statutes of 9 & 10 William III, were thus enlarged. Surprise, imposition or deception of the arbitrators and failure of notice were added grounds.

The Maryland Act of 1778 was not materially changed before February 27, 1801, when it became a part of the law of this District. (Rev. St. D.C. Sec. 92. The present arbitration Act of Maryland is founded on Article 7 of the Maryland Code).

The District of Columbia Code of 1901 added to the Maryland Act and also made several changes therein (§ 16-1701 to § 16-1719, D. C. Code, 1940).

By the District of Columbia Act, when parties consent, in writing, any common-law, admiralty or equity cause (except divorce or nullity of marriage and suits involving incompetents) may be referred for trial, upon the issues of law and fact therein involved, to any party agreed upon. (§ 16-1701).

The arbitrator, called "referee" in our Code, files his award with the Clerk of Court and gives notice thereof to all parties. (§ 16-1705).

The award may be set aside:

1. Because of corruption or misconduct of the referee;

2. Because the referee exceeded his powers;
3. Because the referee executed his powers so imperfectly a final award was not made. (§ 16-1707, See Additional Statutes Involved).

The award may be modified:

1. For evident miscalculation of figures;
2. If the award relates to matters not submitted;
3. If the award is imperfect in form. (*Idem.*)

Prior to our Code of 1901, the award could not be modified, it could only be confirmed, rejected or recommended. *Morse, Arbitration and Award*, 330.

The provisions of § 16-1707 are found in nearly all arbitration acts in the various states. When they or similar provisions appear in the statute, the courts consistently hold (1) that they cannot re-try the controversy before the arbitrator or referee, (2) that mere errors of judgment on the part of the referee will not support a motion to set aside an award and (3) that the award may be set aside or modified only on the grounds enumerated in the statute.

The courts do not look upon the award of arbitrators in the same light as the findings or decisions of trial courts or of referees or masters in chancery, unless the statutes of a state so provide. It is a universal rule that the awards of arbitrators cannot be set aside upon any grounds other than those specified in the arbitration statute.

Where the parties to a dispute decide of their own accord to submit that dispute to arbitration, without restriction or condition, the award in the absence of fraud and mistake, is binding and conclusive on the parties. Usually, the courts will not review the findings of law and fact or substitute their judgment for that of the arbitrator.

Cont. Mill Co. v. Doughnut Corp., 186 Md. 669, 674 48 A. 2d, 447; *Dorsey v. Jeoffray*, 3 H. & McH. (Md) 121; *Ing. v. State*, 8 Md. 287, 294; *Waller v. Waller*, 187 Md. 185, 193, 49 A. 2d 449.

In the Matter of Wilkins, 169 N.Y. 494, 496, 62 N.E. 575; *Motor Haulage Co. v. Internat. Brotherhood, etc.*, 71 N.Y.S. 2nd 352, 353, 272 App. Div. 382; *Application of Bond*, 36 N.Y.S. 2d 147, 154, 264 App. Div. 484, aff'd. 290 N.Y. 901, 50 N.E. 2d 299; *Wheat Export Co. v. New Century Co.*, 173 N.Y.S. 679, 685, 185 App. Div. 723, aff'd. 227 N.Y. 595, 125 N.E. 926; *Fudickar v. Guardian Mutual L. Ins. Co.*, 62 N.Y. 392, 400; *Pine Street Realty Co. v. Controulas*, 253 N.Y.S. 174, 177, 233 App. Div. 404, App. den. 258 N.Y. 609, 180 N.E. 354; *Delma Eng. Corp. v. John A. Johnson Corp.*, 45 N.Y.S. 2nd 913, 916, 267 App. Div. 410, aff'd. 293 N. Y. 653, 56 N.E. 2nd 223; *Perkins v. Giles*, 50 N.Y. 228, 231-2.

The Hartbridge, (C.C.A. 2) 62 F. 2d 72, 73; *James Richardson & Sons, Ltd., v. W. E. Hedger Transp. Corp.*, (C.C.A. 2), 98 F. 2d 55, 57, cert. den. 305 U.S. 657, 83 L. Ed. 426, 59 S. Ct. 357; *Westall v. Avery*, (C.C.A. 4) 171 F. 626, 630; *N. P. Swan Co. v. Stand. Chem. & Oil Co.*, (C.C.A. 5) 256 F. 451, 455.

Upington v. Com. Ins. of N. Y., 298 Ky. 210, 215, 157 S. W. 2d 298;

Springfield v. Walker, 42 Ohio 543, 548.

P. O. S. of A. Hall Ass'n. v. Hartford Fire Ins. Co., 305 Pa. 107, 116, 157 A. 259, 78 A.L.R. 899.

Hatch v. Cole, 128 Wash. 107, 112, 222 P. 463, reh'g. den. 130 Wash. 706, 226 P. 1119.

The only grounds upon which an award may be vacated or set aside are those set forth and defined in the

statute. An award cannot and will not be set aside on any other grounds.

Phelps v. Wayne, Circuit Judge, 117 Mich. 35, 36, 75 N.W. 94; *Taylor v. Smith*, 93 Mich. 160, 163, 52 N.W. 118; *Brush v. Fisher*, 70 Mich. 469, 473, 38 N. W. 466; *Cooper v. Andrews*, 44 Mich. 94, 95, 6 N.W. 92.

In re Pope Constr. Co. v. State Highway Comm., 337 Mo. 30, 32, 84 S.W. 2d 920.

Taylor v. Sayre, et al., 24 N.J.L. 647, 650, *Deakman v. The Odd Fellows Hall Ass'n. etc.*, 110 N.J.L. 304, 306, 164 A. 256; *Held v. Comfort Bus Line Inc.*, 136 N.J.L. 640, 641, 57 A. 2d 20.

In the Matter of Wilkins, 169 N.Y. 494, 498; *Raven Elec. Co. v. Lenzer*, 302 N.Y. 188, 192, 97 N.E. 2d 746; *Delaware County Dairies v. White*, 75 N.Y.S. 2d 434, 438; *Application of Bond*, 36 N.Y.S. 2d 147, 154, supra; *Spring Cotton Mills v. Buster Boy Suit Co.*, 88 N.Y.S. 2d 295, 297, 275 App. Div. 196.

Chair Co. v. Furniture Workers, 233 N.C. 46, 48, 62 S.E. 2d 535; *Cooney v. Parks*, 212 N.C. 217, 218, 193 S.E. 21; *Bryson v. Higdon*, 222 N.C. 17, 19-20, 21 S.E. 2d 836.

Giamopoulos v. Pappos, 80 Utah 442, 449, 15 P. 2d 353.

Boomer Coal and Coke Co., v. Osenton, 101 W.Va. 683, 693, 133 S.E. 381.

We will now demonstrate that the court cannot review this award because the appellant has failed to show that any one of the three statutory grounds for setting the award aside exist.

Our brief will now follow the form of appellant's.

IA

It Was Not Error For the Referee's Counsel to Take Part in the Hearing

This case was heard by a referee under the provisions of § 16-1701 et seq., D. C. Code, 1940. At the start of the hearing it was agreed by all parties that the counsel of the referee could sit with the referee "as advisor", "to guide" the referee in regard to the rules of law and rules of evidence" and "to ask questions of the various witnesses" (94 A).

The hearing took place over a period of nearly two and one-half years. The appellant never once objected to the procedure of which he now complains. The hearings started December 19, 1946 and ended April 18, 1949. (119A). The award was not filed until December 20, 1950. (72A). The present objection to the award was never made before the Referee nor to the trial court. It cannot be raised in this court for the first time.

Unquestionably such objection was never made prior to the filing of the award. If appellant's present objection was of any importance, it should have been used to prevent the award. *Davy's Ex'rs. v. Faw*, 11 U.S. (7 Cr.) 171, 176, 3 L. Ed. 305, below.

Failure of the appellant to make objection on this ground, before the award was filed, is a waiver of that objection.

In *Morse on Arbitration and Award*, 171, we find:

The general rule is that by appearing and proceeding before the arbitrators, after having obtained knowledge of the incompetency or irregularity, the party waives and loses his right to avail himself of the objection to the validity of the award. Silence operates as acquiescence or condonation. To proceed

is to involve all concerned in loss of time and in expense, and also to take the chances of a favorable presentation of the case and a decision in his favor. The party will not be allowed, after putting himself and others in such a position, to refuse to abide by a result which proves unsatisfactory to him.

In *Newcomb v. Wood*, 97 U.S. 581, 583, 24 L. Ed. 1085, the court said:

The objection that the arbitrators were not sworn was waived by the plaintiff in error by appearing and going to trial without requiring an oath to be administered. If the witnesses had not been sworn, the waiver of that defect under the same circumstances would have been equally conclusive. *Edwards, Referees*, 107; *Morse, Arbitration and Award*, 172; *Maynard v. Frederic*, 7 Cush. (Mass.) 247.

To the same effect: *Firemen's Fund Insurance Co. v. Flint Hosiery Mills* (C.C.A. 4) 74 F. 2d 533, 535, Cert. Den. 295 U.S. 748, 79 L. Ed. 1692, 55 S. Ct. 826, below.

I B

The Referees Conclusions of Law Were Not Erroneous.

The appellant asserts that "at least two of the Referee's conclusions of law were clearly erroneous." However, under this heading, appellant attempts to show that the referee's conclusions of law are erroneous because they are not supported by the facts he heard.

The award cannot be vacated or set aside on that ground.

In *United States v. Farragut*, (1874) 89 U.S. (22 Wall) 406, 22 L. Ed. 879, an admiralty case was referred to arbitration by agreement of the parties. Upon an adverse decision, the United States appealed from the judgment

of the Supreme Court of this District confirming the award. The following rule was laid down for arbitration cases, (89 U.S. 420):

Where the award finds facts it is conclusive. Where it finds or announces concrete propositions of law, unmixed with fact, its mistake, if one is made, could have been corrected in the court below, and can be corrected here. Where a proposition is one of mixed law and fact, in which the error of law, if there be one, cannot be distinctly shown, the parties must abide the award.

The award was also liable, like any other award, to be set aside in the court below, for such reasons as are sufficient in other courts. For exceeding the power conferred by the submission, for manifest mistake of law, for fraud, and for all the reasons on which awards are set aside in courts of law or chancery. A motion was made in that court to set aside the award on the following grounds:

(Six grounds are set forth.)

A glance at these grounds will show that all of them, except the last, is an attempt to reopen the questions submitted to the arbitrators, because they had decided erroneously questions of pure fact, or of law and fact, in which the former was so mingled with the latter as to be inseparable.

Applying these principles to the case before us, we think we are bound by the first statement of the award, that the capture was not a conjoint operation of the army and navy. There is no evidence here of any misapprehension of the law governing that question, and it must obviously have been one mainly of fact, and the award is, therefore, conclusive.

The appellant also claims (Brief 16) that "the assignments made by the appellant were not in excess of his authority but were well within his natural and normal powers as the executive officer of the company." The assignments mentioned were assignments of negotiable in-

struments belonging to the corporation. The appellant overlooks the findings of the Referee on that point, (76A):

* * * Mr. Stern in his testimony stated that on January 10, 1945, some two months prior to the time that he left the corporation, he made these assignments for the protection of the various individuals and in each instance he assigned paper in amounts greater than the amount alleged to be due the assignee. He attempted to explain this by stating that the assignees were entitled to profit. * * * Mr. Stern testified that he collected money on the notes assigned and instead of turning over the money to the assignees, he kept it himself. (Vol. 18, page 57). While under examination in an effort to glean some information concerning these assignments, Mr. Abram E. Stern was on many occasions vague, indefinite and impertinent.

In view of the facts before him, the Referee could not have found other than he did.

It is established law that "a general agent charged with the management of a corporation is not authorized to dispose of its entire property in a single transaction, in the absence of special authority so to do." *In re William P. Butler & Co.*, (C.C.A. 1) 207 F. 705, 713.

See Also: *Fogg v. Blair*, 139 U.S. 118, 126, 35 L. Ed. 104, 11 S. Ct. 476; *Everett v. Mortgage Co.*, 214 N.C. 778, 785, 1 S.E. 2d 476; *Piggins v. Linville*, 86 Md. 210, 231, 38 A. 37; *State Nat. Bk. v. John Moran Packing Co.*, 68 Ill. App. 25, 39; *Dequan v. Thompson*, 88 Mo. App. 62, 66; *Electronic Development Co. v. Robson*, 148 Neb. 526, 540, 28 N.W. 2d 130; *Piggins v. Fellingner*, 318 Mich. 398, 405, 28 N.W. 2d 273.

There can be no legitimate contention here that appellant was authorized to assign the assets of this corporation to his wife, son and daughter, Hanna Rose Alexander, A. Edwin Stern, Jr., and Adele Stern.

I B, 2**The Referee Rendered a Proper Account**

It is asserted by appellant that: "The Referee has ignored the outstanding checks of the Stern Company of Washington, exchanged by appellant for loans to the company, and has left this important element of the accounting unsettled" (Br. 17).

To the contrary, the referee did consider all of those items and concluded that appellant had no right to issue such checks and that such issuance was a fraud on the Stern Company (76A-79A).

Appellant also claims (Br. 18), that the books and records of the Stern Company were so inadequately kept that the Referee could not make a finding. However, the referee found that appellant was in sole charge of the affairs of the corporation from 1940 to 1945; that in apparent anticipation of his leaving, appellant removed many of the records of the corporation consisting of accounts receivable, notes, conditional sales contracts, etc. (74A); that the appellant assigned notes of the corporation without authority, collected money on them which he retained and about which he refused to give the Referee information (74A, 77A); that appellant could have supplied information about the status of the corporation, of himself and the individual appellees, but the appellant exhibited a complete lack of candor or cooperation and refused to obey the orders of the Referee (73A); that during the time appellant kept or had the books kept they were incomplete, missing, poorly kept, hazy and mixed up. (95A, 101A-104A, 109A-112A).

The appellant will not be allowed to conceal the accounts, records and books of the company and then complain that the award of the Referee is incorrect be-

cause it does not show a balance struck as shown by proper books and records.

When a party litigant refuses to furnish books and records for dollar and cent calculation, he cannot complain when the fact-finder makes his calculations on other available evidence which supports the finding.

In *Providence Rubber Co. v. Goodyear*, 76 U.S. (9 Wall) 788, 19 L. Ed. 566, a suit was filed to enjoin the infringement of patents and for an accounting. The case was referred to a master to state an account. There were two companies involved. It appears that no separate account was kept as to the cost and profit of patented and non-patented articles and that: "the business as to both was so intermingled and confused that approximate results (of accounting) only were possible." (76 U.S. 802). The Court said, (76 U.S. 803):

He (the master) refused to allow the profits due to the elements not patented, which entered into the composition of the patented articles. There may be cases in which such an allowance would be proper. This is not one of them. The manner in which the books of the Providence Company were kept renders such an account impossible as to the business done in their name.

The conduct of the defendants in this respect has not been such as to command them to the favor of a court of equity. Under the circumstances, every doubt and difficulty should be resolved against them. *Luntton v. White*, 15 Vesey, 432; *Copeland v. Crane*, 9 Pickering, 79; *Dexter v. Arnold*, 2 Sumner, 109; *Miller v. Whittier*, 36 Maine, 585. The allowance was properly denied.

I, B. 3

The Award to Celia Stern Was Proper

Celia Stern testified that the merchandise taken over by Abe Stern, acting for the corporation, was "worth

about \$6,700, less than it cost me. I also gave my last \$800 to \$900 in the bank and never got it back when I left." (105A)

She also testified that she had "something over \$5,000" in the stock taken by the corporation. (100A) There is nothing contradictory there.

The referee allowed Celia Stern \$6,700. He did not allow her claim of the \$800 or \$900 advanced to the corporation.

Celia Stern's testimony was not denied. The appellant was a competent witness as to the value of Celia Stern's merchandise, which he took. Yet he did not deny her claim in the amount of \$6,700.

The finding of the Referee on that point is supported by competent evidence. It is a finding of fact which cannot be disturbed by the Court.

I, C

The Form of the Referee's Report

The statute (§16-1707) does not require the referee to state the findings of fact and the conclusions of law, separately. The award of the referee announced mixed propositions of law and fact. In such case, the error of law, if any, must be "distinctly shown". *United States v. Farragut*, 89 U.S. 406, 420, above. This, appellant has not done.

However, appellant cannot urge this error now, because he did not raise the point in the trial court. (85A)

Moreover, although the findings of fact and conclusion of law are not set apart, they are sufficiently distinguishable for appellant to recognize them one from the other, because he complains in his brief, p. 14, that: "At least

two of the Referee's conclusions of law were clearly erroneous."

In any event, § 16-1707, D. C. Code, 1940, provides that the award may be modified, if it is imperfect in form. Consequently, the award cannot be set aside for failure to state separately the findings of fact and conclusions of law.

The appellant has not asked for modification. Consequently, this claim of error should be denied.

I, D

The Alleged Bias and Prejudice of the Referee

The appellant charges bias and prejudice against the Referee. The alleged bias and prejudice of the arbitrator were known to the appellant long before the award was made and filed. Failure to complain of known fraud before the award, is a waiver of the alleged error. *Morse, Arbitration and Award*, 171. *Newcomb v. Wood*, 97 U.S. 581, 583, above; *Davy's Ex'r. v. Faw*, 11 U.S. (7 Cr.) 171, 173, above.

In *Firemen's Fund Ins. Co. v. Flint Hosiery Mills*, (C.C.A. 4) 74 F. 2d 533, 535, cert. den. 295 U.S. 748, 79 L. Ed. 1692, 55 S. Ct. 826, the court said:

* * * the general rule is that one who proceeds with an arbitration with knowledge of facts indicating bias on the part of an appraiser waives the disqualification, and may not thereafter use it as a basis for setting aside the award. *Thomajanian v. Odabiskian*, 272 Mass. 19, 172 N.E. 232, 47 L.R.A. (N.S.) note, p. 342. *Duvall v. Sulzner* (C.C.) 155 F. 910; *Commonwealth Tobacco Co. v. Alliance Insurance Co.*, 238 Mass. 514, 516, 131 N.E. 213; *Chicago, R. I. & P. R. Co. v. Union P. R. Co.*, (C.C.A.) 254 F. 235, 238.

See also: *First Nat. Bk. v. Clay*, 231 Iowa 703, 715-6, 2 N.W. 2d 85; *Hatch v. Cole*, 128 Wash. 107, 112, 222 P.

463, rehig. den. 130 Wash. 706, 226 P. 1119; *Cecil v. Bank of America, etc.*, ... Cal. App., 236 P. 2d 408, 409, 411.

II

This Court Has No Authority to Reject the Award and to Appoint a Receiver

The appellant and appellees agreed, of their own accord, to submit to the referee their dispute as to the necessity of a receiver for the corporation.

The Referee's finding of fact thereon is clear and to the point. (74A).

Neither the trial court, nor this court, can set aside or reject those findings. They are conclusive.

This is not an equity case where this court can grant the relief now requested by the appellant.

The relief which this court can grant to appellant in respect to setting aside the award is prescribed by statute, § 16-1707, D. C. Code, 1940. The award may be set aside only on any one of three grounds. It may be modified only on any one of three grounds. The general equity powers of this court are limited by the provisions of § 16-1707.

CONCLUSION

The appellant has failed to show any ground for vacation or modification of the Referee's award. The judgment in this case must be affirmed.

Respectfully submitted,

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Washington, D. C.
Attorney for Appellees

No. 11,335

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABRAM E. STERN, *Appellant*,

v.

THE STERN COMPANY OF WASHINGTON, D. C., ET AL.,
Appellees.

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals

For the

District of Columbia Circuit

FILED OCT 20 1934

Joseph A. Stewart

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,335

ABRAM E. STERN, *Appellant*,

v.

THE STERN COMPANY OF WASHINGTON, D. C., ET AL.,
Appellees.

Appeal from the United States District Court
for the District of Columbia

REPLY BRIEF FOR APPELLANT

I. Introduction—

The Appellant submits herewith its reply to the principal arguments raised in the Brief of the Appellees.

II. Abram E. Stern Had Authority to Make the Assignments and/or Collections Here in Question.

A. *The Referee Erroneously Found That as Matter of Law the Appellant Did Not Have Authority to Make the Assignments and/or Collections.*

Abram E. Stern, appellant, was President and General Manager of the Stern Company of Washington, D. C.

until the early part of 1945. Shortly before he withdrew as an officer of this corporation, he made a number of assignments of notes and conditional sales contracts to persons whom he alleged to be creditors of the corporation. The Referee made the following statement with respect to this transaction, which appears at page 76-A of the Joint Appendix:

"The Referee finds from all of the evidence that there was no authority and law for these assignments and that Mr. Abram E. Stern exceeded his authority."

The Referee expressly declined to make any findings with respect to whether or not the assignees of these notes and conditional sales contracts were bona fide creditors of the Stern Company of Washington, D. C. His statement in this regard, which is quoted below, appears at Page 76-A of the Joint Appendix:

"This Referee feels that he is not called upon to decide the validity of these claims, since these persons are not parties to this action and are not included in the reference."

The Referee made this further statement which appears at Page 79-A of the Joint Appendix:

"Because of apparent lack of jurisdiction, your Referee takes no position on the claims of the persons enumerated above . . ."

The sole basis, therefore, of the judgment against Abram E. Stern for the assignment and/or collection of notes and accounts receivable was that he did not have as a matter of law authority to make these assignments and/or collections on behalf of bona fide creditors of the corporation.

B. *The President and General Manager of a Corporation Has Authority to Do All Acts Ordinary and Necessary in the Conduct of Business.*

In the case of *Russell v. Washington Savings Bank*, 23 App. D. C. 398 (1904), the Court made the following statement at page 407:

"... the president and other officers, and not the board of directors, are those who are usually brought into contact with third persons in the conduct of the business of the organization; and custom and usage, and the necessities of the social order, demand that these executive officers should be regarded as entitled to bind the organization in all matters which such organizations are accustomed to transact ..."

This case supplements those which appear at pages 16-17 of the Brief of Appellant and states the general rule in force in this jurisdiction. There seems little question but that this procedure complained of had been the custom and practice of the managing officers of the Stern Company for a period of several years.

Mrs. Hazel White, who was bookkeeper for the corporation for the period, 1935 to April 1942 (J.A. Page 120A et seq.) testified that Mrs. H. Rose Alexander, wife of the Appellant, regularly loaned money to the corporation, that these loans were deposited in the corporation's bank account and that in consideration Mrs. Alexander was given checks of the Stern Company of Washington under an agreement that these checks would not be cashed (J.A. Page 120A et seq.).

Mrs. Vivian Cohn, who was also a bookkeeper for the Stern Company of Washington, gave similar testimony (J.A. Page 120A et seq.).

Mr. Abram E. Stern's own testimony in this regard is quoted below. This testimony appears at Page 120A et seq. of the Joint Appendix.

BY MR. FISCHER:

Q Mr. Stern, I have a series of checks issued by the Stern Company to Madame Rose or Mrs. Rose Alexander for a period of time running from 1938 through 1942, together with attached checks signed by Rose Alexander, Sadie Nachman, and Madame Rose, H. Rose Alexander, etc.; and explain what those checks are.

A Those are checks of the Stern Company that were given to Madame Rose, Mrs. H. Rose Alexander, Sadie Nachman, in payment for checks that they gave the Stern Company, and each one is attached, show that they have been paid and that they are not a liability of the Stern Company.

Q In other words you borrowed money for the Stern Company as per the checks and the checks are attached to the checks of the Stern Company?

A That is right. Their checks are all made payable to the Stern Company and were deposited in the bank in the circulating account. Each and every one shows the stamp. In lots of cases we had to take them in to Mr. Goldman and had them cashed before we deposited them in the bank.

Q I show you another batch of checks of the Stern Company. Attached to them are checks of Rose Alexander, Sadie Rose Nachman, and Hannah Rose Alexander, President and Treasurer respectively, and checks by Madame Rose, on various banks in the District of Columbia, including the Washington Loan and Trust Company, the Hamilton National Bank, and the Columbia National Bank, and ask if you will kindly identify those checks and state what they were for.

A These were for checks given by Hannah Rose Alexander, Mrs. Sadie Nachman, and Madame Rose to the Stern Company. They were deposited to the credit of the Stern Company. Some of them here, I notice, are payable to "Cash" and endorsed by Frances Koven and marked that they are "to repay a loan that we made to Abe Stern," and signed to H. Rose Alexander.

Q Do they all represent moneys loaned to the Stern Company?

A They represent money that was advanced to the Stern Company.

Q Advanced to the Stern Company by these various people?

A That is right, and they have been paid.

Q And they have been paid?

A Yes, sir.

Q Was that a series of transactions that ran over a period of years, that is shown by those checks from 1937 on?

A I think from 1936.

Q In other words, your testimony would be to the effect that you borrowed money for the Stern Company from them over a long period of time, running from approximately 1936?

A That is right.

Q In continuous transactions?

A That is right, almost nine years.

Q And you continued up to 1945?

A That is right.

The above testimony establishes the pattern of financing the Stern Company of Washington and one of the methods for giving security for funds advanced to the corporation. The appellees in their pleadings have admitted much of which they now contend is still at issue.¹

The appellees in their Answer to the original complaint admit that the practice of "check-kiting" was regularly employed by the appellant (J.A. Page 50A); that Mrs. Helene Stern, mother of the litigants, received fifty conditional sales contracts in consideration for money loaned to the corporation (J.A. Page 57-A) and that Celia Stern, herself, had an agreement with the corporation whereby notes and conditional sales contracts could be sold to her

¹ As between the parties' admissions in pleadings are conclusive. *Ballock v. Hooper*, 146 U.S. 363 (1892); *Atemus v. Talmadge*, 58 F 2d 874, 61 App. DC 148, Cert. denied 287 U.S. 614, 77 L. Ed. 533 (1932); *Banks v. Torre*, 56 A. 2d 52 (Mun. App. D.C. 1947).

in exchange for advances to the corporation (J.A. Page 58-A).

In view, therefore, of the financial difficulties of the corporation, the need for regular borrowing and the practice of giving in exchange for loans either checks of the corporation or the notes and conditional sales contracts of its customers, this Court should rule that as a matter of law the Referee was in error when he found the appellant without authority to make the assignments and/or collections here at issue.

C. None of the Cases Cited by the Appellee With Respect to This Matter is in Point.

Appellees have argued at page 14 of their Brief that it is established law that a general agent is not authorized to dispose of the corporation's *entire* property in a single transaction in the absence of special authority. This is a proposition with which appellant sees no reason to disagree because the question here involved is not whether a President and General Manager could dispose of a corporation's *entire* property but rather whether he could assign a *small portion* of its assets to bona fide creditors in satisfaction of legitimate obligations.²

Indeed, none of the cases cited by Appellees at page 14 of the Brief are in point:

1. *In re William P. Butler & Co.* 207 F. 705 (CCA 1, 1913), involved the conveyance in effect of *all* the corporate property to a Receiver.

² The appellees have admitted that the Stern Company of Washington had inventory in the value of approximately \$40,000; owned land with a value for taxation purposes in excess of \$77,000; and that even after the assignment of the notes and conditional sales contracts here at issue, the corporation could easily continue operations. (J.A. Page 44-A, 55-A-56-A)

2. *Fog v. Blair*, 137 U. S. 118, 35 L. Ed. 104 (1891), involved an action by a creditor of a railroad against a shareholder who allegedly did not pay full value for his stock. The Court held that unpaid stock subscriptions are a trust fund for its creditors and that a corporation by its *Directors* could not dispose of corporate assets to the prejudice of creditors.

3. *Everett v. Mortgage Co.* 214, N. C. 778, 1 S. E. 2d 476, involved an alleged fraudulent conveyance in the transfer of *all* of a corporation's assets to one who was not a bona fide purchaser without making provisions for the payment of creditors. There was no question in this case as to the authority of the officers to make the transfer.

4. *Piggins v. Fellingner*, 318 Mich. 398, 28 N. W. 2d 273, involved an action by a Receiver of a corporation to set aside a transfer of property by the President of a corporation to said President and another business associate. The Receiver argued that the action was a breach of fiduciary duty. This case was controlled by the corporate By-Laws which specifically provided that the company should not be obligated financially by any one of its officers for an amount in excess of \$50 without the approval of the Board of Directors.

5. *State National Bank v. John Moran Packing Co.*, 68 Ill. App. 29 (1896), involved an action to foreclose on a mortgage and a defense that the mortgage was invalid because *inter alia* it constituted an unlawful preference, since the corporation was insolvent. These facts alone distinguish it from the case at issue. The Court therein held as follows:

"In this State it has long been the rule that the President of a corporation is presumed to have authority to transact for the corporation business of an ordinary nature arising in the routine of affairs,

such an custom or necessity has imposed on the office." (Page 39)

6. *Degman v. Thompson*, 88 Mo. App. 62, could not be located in the Library of Congress and its applicability to this case cannot be ascertained.

7. *Electronics Development Co. v. Robson*, 148 Neb. 526, 28 N.W. 2d 130 (1947), involved this situation: The managing officers of a corporation without specific authority entered into a contract with a partnership in which they were principals whereby the partnership acquired all the facilities of the corporation. The result of such arrangement was to terminate the operation of the corporation for the period of the contract. The Court held that such contract was not within the scope of the authority of the managing officers.

8. *Hadden v. Lynville*, 86 Md. 210, 38 A. 37 (1897) involved the transfer by the President and General Manager of *all* the corporate assets within his control to satisfy the debts of one creditor as against another creditor who sought to attach the goods transferred.

The cases relied upon by the Appellees in support of the proposition that the President and General Manager of the Stern Company of Washington, D. C. could not assign to bona fide creditors a fraction of the assets of a solvent corporation are entirely without weight. Of the eight cases relied upon by the Appellees, one could not be located, one involved the authority of Directors as distinguished from a President, three involved the transfer of *all* corporate assets, and three involved transfers that were considered either fraudulent conveyances or preferences. Not one of the cases is authority for the rule of law relied upon by the Referee.

III. Since the Referee Admittedly Rendered an Incomplete Report, it Should be Ruled Invalid by This Court.

The Appellees contend that the Appellant's apparent disability to furnish complete and accurate records make it necessary to resolve all doubts against him. Such contention is invalid for two reasons:

In the first place, Hyman Stern was the Secretary-Treasurer of the Stern Company of Washington, D. C. throughout the period investigated by the Referee. Fletcher on Corporations (Permanent Edition) Section 636 states that generally a Secretary's duty is to make and keep all the corporate records. At Section 654 this same authority states that the Treasurer of the corporation ordinarily and customarily receives and keeps the monies of the corporation and disburses them as he may be authorized to do. The failure of Hyman Stern to exercise properly the obligation of the office which he held, throughout which period he received compensation as an officer, removes whatever standing he might otherwise have had to ask a court of equity to place the blame for faulty bookkeeping on the Appellant.

In the second place, it was the complaint of the Appellees that initiated the accounting against Abram E. Stern and it is their obligation to assume the burden of proof in connection with the allegations they have made. In the absence of any wrong-doing by Appellant, the vagaries of the corporation's bookkeeping system should not be resolved against him but should rather be interpreted as the inability of the Appellees to prove the allegations which they have made.

IV CONCLUSION

For the reasons discussed in the original and this Reply Brief, the appellant requests that the judgment of the lower Court be reversed and that this Court either direct the appointment of a Receiver or remand with instructions for a new reference.

Respectfully submitted,

A. L. WHEELER

JERROLD SCOTT, JR.

Attorneys for Appellant

October 28, 1952

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the*

District of Columbia Circuit

FILED DEC 12 1952
No. 11,885

Joseph W. Stewart

CLERK

ABRAM E. STERN, *Appellant*

v.

THE STERN COMPANY OF WASHINGTON, D. C., ET AL,
Appellee

PETITION FOR REHEARING

The appellant, by his attorney of record, petitions the Court to grant a rehearing in the above entitled cause, and upon rehearing and further consideration hereof that the judgment entered herein on November 28, 1952, be reversed and entered in favor of petitioner, and for grounds of this petition states as follows:

1. That the judgment entered by the District Court of the United States for the District of Columbia, which was affirmed by an order of this Court, is based upon transactions which occurred between approximately three and six years subsequent to the pleadings which instituted this cause. Since these transactions were subsequent to the pleadings, the recommended findings by the Referee were outside the scope of his authority and in excess of his powers; accordingly, the decree of the District Court of the United States for the District of Columbia accepting the recommendations of the Referee should be set aside as has been requested. See: 16 DC Code 1707.

2. That the pleadings in this case were filed in the Fall of 1942:

- (a) The Bill for Receiver was filed on August 19, 1942 (JA p. 2A);
- (b) The Joint and Several Answer and Counter-Claim and Cross-Claim was filed on September 14, 1942 (JA p. 16A);
- (c) The Answer of Abram E. Stern to the Cross-Claim and the Counter-Claim of the Defendants was filed on October 15, 1942 (JA p. 65A).

3. That the reference to the Auditor on December 10, 1945, was made "in regard to issues disclosed by all pleadings filed herein". (JA p. 89A), and the order entered by stipulation referring this matter to a Referee on May 31, 1946, also provided for the hearing and determination of all issues of law and fact raised by the pleadings. (JA p. 90A)

4. That the Referee's Report filed on December 20, 1950 contains a section entitled "Moneys Due The Corporation by Abram E. Stern" (JA p. 80A). The transactions which were the basis for the alleged obligations of Abram E. Stern to the corporation occurred between approximately three and six years subsequent to the pleadings which should have been the basis for the hearing before the Referee.

5. That the appellant's (plaintiff below) motion to set aside the Referee's award, which was filed on January 5, 1951, specifically objects that the Referee exceeded the powers granted to him and reached conclusions on matters which were not submitted. (JA p. 85A) Supplement to Points and Authorities in Support of Motion to Set Aside Referee's Report, filed January 26, 1951, elaborates on the contentions noted in the aforementioned Motion (JA p. 127A)

6. That the Memorandum Opinion filed by the District Court for the District of Columbia on December 7, 1951 specifically notes that appellant (plaintiff below) had objected to the Referee's award because he had exceeded his powers and reached conclusions on matters not submitted. (JA pp. 90-91A)

7. That counsel for appellant argued to this Court that the decision of the Court below must be set aside for the following reasons:

- (a) That the transactions which were the basis for the alleged debt of appellant to the corporation occurred subsequent to the pleadings in this cause and could not properly have been within the scope of the reference to the Referee.
- (b) That the uncontroverted facts recited above establish that the Referee in making his award exceeded his powers and that therefore judgment entered on the basis of his award must be set aside pursuant to the terms of Title 16, Section 1707, DC Code.

8. That the *per curiam* decision of this Court states as follows:

"The award of a Referee or arbitrator may be vacated or modified only on the grounds clearly specified in the statute. No showing of the existence of these grounds having been made, we see no reason to disturb the judgment of the District Court."

There was no discussion whatever in the opinion of this Court of the argument recited above that the transactions which were the basis for the Court's determination were not even properly before it for determination.

WHEREFORE, appellant respectfully requests a rehearing limited to the above described question in order that a just determination may be made in this case. The appellant requests further that the judgment of this

Court entered on November 28, 1952, be reversed and entered in favor of Petitioner.

Respectfully submitted.

Jerrold Scoutt, Jr.
JERROLD SCOUTT, JR.

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CERTIFICATE

I hereby certify that this Petition for Rehearing is presented in good faith and not for the purpose of delay.

Jerrold Scoutt, Jr.
JERROLD SCOUTT, JR.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition has been delivered to the attorney of record for the appellees in this cause.

Jerrold Scoutt, Jr.
JERROLD SCOUTT, JR.

No. 11,335

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED AUG 5 1952

ABRAM E. STERN, Appellant

Joseph W. Stewart
CLERK

v.

THE STERN COMPANY of Washington, D. C., et. al.,
Appellees

Appeal from a Judgment of the District Court of the
United States for the District of Columbia

~~United States Court of Appeals~~

~~For the
District of Columbia Circuit~~

~~FILED JUN 28 1952~~

~~*Joseph W. Stewart*
CLERK~~

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STATEMENT OF QUESTIONS PRESENTED

The following questions are raised by this appeal:

(1) In a case involving a bill for receiver and a counter-claim for an accounting referred to a referee, was it proper for the referee

(a) to delegate some of his powers to an attorney engaged by him to advise on matters of law,

(b) to allow his counsel to exceed the authority delegated by the referee so as to constitute an outright usurpation of the basic functions of a referee?

(2) Under a reference "to hear and determine the issues of law and fact involved in this cause" was the report of the referee a satisfactory basis for judgment when it contained erroneous conclusions of law, failed to settle conclusively the whole matter referred, and was admittedly based upon incomplete books and records and self-contradictory testimony?

(3) Did the referee's report conform to the statute under which the reference was made (D.C. Code, Title 16, Sec. 1701 et seq.) and to generally accepted principles of law when it failed to state separately conclusions of fact and conclusions of law and when it contained, in addition to findings of fact and law, extraneous matter such as comment, surmise, and repetition of a portion of the evidence?

(4) Was the Referee's report influenced by bias and prejudice?

(5) Should this court, in the exercise of its powers as appellate court in an equity cause, grant the relief sought by the appellant in his original bill or should it merely reverse and remand the case to the court below for further proceedings?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,335

ABRAM E. STERN, *Appellant*

v.

THE STERN COMPANY of Washington, D. C., et al.,
Appellees

Appeal from a Judgment of the District Court of the
United States for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTION OF THE COURT

In the District Court of the United States for the District of Columbia, this action consisted of a Bill for Receiver and a cross and counter claim for an accounting involving an amount in excess of \$3000, exclusive of costs and interest. The matter was referred to and heard by a Referee under the provisions of the Act of Mar. 3, 1901, 31 Stat. 1254, ch. 854, Sec. 412, as amended by the Act of June 30, 1902, 32 Stat. 530, ch. 1329, District of Columbia Code (1940 Edition) Title 16, Sec. 1701 et. seq.

The jurisdiction of this Honorable Court is based upon the Act of June 25, 1948, C. 646, 62 Stat. 929, U.S.C. Title 28, Sec. 1291.

SUPPLEMENTAL STATEMENT OF THE CASE FOR BRIEF OF THE APPELLANT

This action was begun in August, 1942, by the appellant, Abram Stern, plaintiff below, who filed a Bill for Receiver in the District Court of the United States for the District of Columbia, naming his brother, Hymen Stern, his sister, Celia Stern, and the Stern Company of Washington as defendants, now appellees. (J.A. p. 2A) The corporation is owned in equal parts by Abram, Hymen, Celia Stern. (J.A. p. 39A) It was formed in 1925 as the successor to a previously unincorporated family enterprise engaged in the restaurant and store equipment business. (J.A. p. 20A) At the time of the corporation's inception, Helene Stern, the mother of Abram, Hymen and Celia Stern, had been the dominant figure in the business and was assigned fifty-one shares of the one hundred shares of authorized capital stock of the corporation. Twenty-three and one-half shares each were issued to Abram and Hymen Stern, the remaining two shares being issued to non-members of the family to qualify them for membership on the board of directors. (J.A. p. 31A) These two shares of stock were subsequently lost and are of no relevance to this case. The original officers of the corporation were: Helene Stern, President; Abram Stern, Vice-President; and Nathan Canton, Secretary. Subsequently Hymen Stern was elected Secretary-Treasurer, the other officers remaining unchanged until the death of Helene Stern in 1940. (J.A. p. 28A) It was agreed at a stockholder's meeting held in 1927 that Helene Stern, Hymen Stern and Abram Stern should each have a salary of \$125 a week. (J.A. p. 34A).

The conduct, operation and management of the corporation was largely in the hands of the appellant and the appellee Hymen Stern, from 1925 until 1936 (J.A. p. 21A) when Hymen Stern ceased active participation in the business and opened a restaurant business of his

own, utilizing, by his own admission, an unascertained amount of fixtures which he took from the Stern Company of Washington without making payment therefor. Hymen Stern later sold this restaurant, and in 1940, he moved to Norfolk, Virginia where he operated and still operates a business similar to the Stern Company of Washington which he and his sister, appellee Celia Stern, inherited from another brother, Max E. Stern.

In 1940, Helene Stern died, bequeathing 33 shares of stock in The Stern Company of Washington to Celia Stern, and nine shares each to Abram E. Stern and Hymen Stern. (J.A. p. 56A-57A) From that time to the present, the ownership of the Stern Company of Washington has thus been about evenly divided among the parties to this case. (J.A. p. 39A)

In 1941, the corporation sold certain real estate, netting approximately twenty-eight thousand dollars, which sum, instead of being paid to the corporation was deposited in a special account in the National Bank of Washington to the credit of Abram, Hymen and Celia Stern (J.A. p. 44A) under an arrangement whereby no checks could be charged against the account unless signed by all three. Shortly thereafter, when the corporation was in need of funds, the three parties agreed that Abram Stern could withdraw \$5,000 for the use of the Stern Company in exchange for Hymen Stern's being allowed to withdraw \$5,000 for a loan. (J.A. p. 79A)

The business relationship of Abram Stern and Hymen Stern had, for a period of many years, been characterized by controversy, bickering and an inability to agree on matters of business policy. (J.A. p. 21A) Their quarrels had been a basic cause for the incorporation of the business in 1925 and played a large part in the withdrawal of Hymen Stern from the business in 1937. (J.A. p. 36A) After the death of the mother, Helene Stern, Abram Stern realized that when the stock which his mother had left to all three of the children was distrib-

uted, the majority control of the corporation would pass to Hymen and to Celia, who sided with her brother Code, 1940 Edition with full power and authority to hear and determine the issues of law and fact involved in this cause. (J.A. p. 90A)

Hymen in the intra-family quarrels. He feared that their animosity would result in his being forced out of the active management of the corporation and that his financial interest therein would be endangered. Accordingly, he brought a Bill for Receiver in which he alleged that the continued hostility of Hymen and Celia Stern, their indifference to the financial plight of the corporation, their interference in the management of the corporation, and their actions with respect to tying up certain funds of the corporation which could not be used without their acquiescence and which were urgently needed by the corporation made continued operation of the business no longer possible. He also alleged that he had been forced to borrow funds from relatives and friends to meet the needs of the business and that the corporation owed him at least \$3340 in back salary. The bill prayed for the administration and disposition by the Court of the property and assets of the corporation. (J.A. p. 11A-12A)

Appellees Hymen and Celia Stern filed an answer to the Bill for Receiver and also filed a Counter Claim and Cross Claim demanding an accounting from Abram Stern for his management of the corporation and its assets. (J.A. 16A-64A) There were numerous conferences among the parties in an effort to reach a settlement, but to no avail. The case was then referred to the Auditor of the Court on December 10, 1945, to state the account and report the result of his findings to the court. (J.A. p. 89A) Thereafter, certain demands for the posting of large sums of money were made by the auditor, to which none of the parties agreed, and by stipulation of the parties dated April 22, 1946 and by an order of the Court dated May 31, 1946, the case was withdrawn from

the Auditor and a reference was made to Hymen Goldman under Title 16, Section 1701 et. seq. of the D. C.

In 1945, the shares of stock in the corporation bequeathed by Helene Stern having been distributed to the legatees, a stockholder's meeting was held at which Hymen Stern was elected President and Celia Stern was elected Secretary-Treasurer. Abram Stern was not elected to any office and on March 15, 1945, he withdrew from active management of the company and has not participated in its affairs since. (J.A. p. 74A) Shortly after his withdrawal, he went into business for himself on Fourteenth Street in Washington trading as the Stern Equipment Co., Inc. Hymen Stern, although the titular head of the Stern Company of Washington, has continued to reside in Norfolk and has rendered advice to the company by telephone. He, and Celia Stern, who is actually running the company, have each drawn a salary of \$100 a week.

The hearings under the reference were commenced in December, 1946. Although the terms of reference included the hearing and determination of the issues of law and fact involved within the scope of the pleadings, (J.A. p. 90A) the hearings were conducted on the sole point contained in the appellees' cross and counter claims, namely, the accounting demanded of the appellant, Abram Stern. The parties were, in effect, reversed, the defendants below first making their case and the plaintiff below defending himself against their allegations. Conflicting evidence was given by both sides. (J.A. p. 73A) From this mass of evidence, the following uncontroverted facts can be adduced: Throughout most of the history of the Stern Company of Washington, it was in financial difficulties of varying degrees of seriousness. The appellant had been forced to resort to the practice of kiting checks, first with his mother during her lifetime and afterwards with other members of his family and friends. These transactions usually were accomplished by means of the lenders advancing either cash or a check to the Stern Company in exchange for which they were given checks of

the Stern Company of even amount which, it was understood, were not backed by sufficient funds and were to be held as security by the lenders. (J.A. p. 76A) Upon Abram Stern's being forced out of the management of the Stern Company, he took with him certain promissory notes and conditional sales contracts representing amounts due the Stern Company from its vendees, some of which he assigned to these lenders in satisfaction of the outstanding, un-cashed checks. Some of them he assigned to himself in satisfaction of salary he had been unable to collect during the lean years and for moneys he had advanced the corporation. The books and records of the Stern Company over the entire period of its existence are admitted to be incomplete and inaccurate and there was no way to determine from such records (i) the actual value of the notes and conditional sales contracts as of the time they were taken from the company or (ii) the amounts advanced to the company by Abram Stern's family in payment of which the notes were assigned. (J.A. p. 25A, 73A, 95A, 101A, 102A, 103A, 104A, 109A, 110A, 111A, 112A) There was also evidence to the effect that before Abram Stern left the Stern Company of Washington he had personally received payments on transactions involving the Stern Company which he claimed were due him for back salary and moneys advanced the company. An examination of the books, records and miscellaneous data of the Stern Company was made by a Certified Public Accountant employed by the Referee and his report is attached to the Referee's award.

The Referee's report was submitted to the Court in December, 1950. The award (i) denied the application for receivership and the claim of Abram Stern for back salary; (ii) denied the claim of Hymen Stern for back salary and found him indebted to the corporation in the sum of \$5,000; (iii) denied the claim of Celia Stern for back salary but found the corporation indebted to her in the amount of \$6700 for merchandise turned over by her to the corporation for which she had never been reim-

bursed; and (iv) found Abram Stern indebted to the corporation in the amount of \$32,836.85 arising out of the assignment to himself of and subsequent collection on notes and conditional sales contracts of the Stern Company. (J.A. p. 72A-84A) No disposition was made of the outstanding checks of the Stern Company of Washington which had been issued in exchange for loans made to the company and which are still outstanding. The appellant moved to set aside the Referee's award, (J.A. p. 85A) which motion was denied, (J.A. p. 91A) and judgment was entered in accord with the Referee's report. (J.A. p. 91A) Subsequently, Abram E. Stern filed a timely notice of appeal to this Honorable Court in support of which this brief is respectfully submitted. (J.A. 93A).

RELEVANT STATUTES

1. Act of Mar. 3, 1901, 31 Stat. 1254, ch. 854, Sec. 412, as amended by the Act of June 30, 1902, 32 Stat. 530, ch. 1329, D.C. Code, Title 16, Sec. 1701.

"By consent of the attorneys or solicitors on both sides, manifested by written stipulation, any common-law or admiralty or equity cause pending in the District Court of the United States for the District of Columbia, except suits for divorce or nullity of marriage, or suits wherein any party to be affected by the result is an infant, idiot, or lunatic, may be referred for trial, upon the issues of law and fact therein involved, by an order of court, to some referee consented to by the parties or their counsel and named in the order."

2. Act of Mar. 3, 1901, 31 Stat. 1255, ch. 854, Sec. 417, D.C. Code Title 16, Sec. 1706.

"The final award of the referee shall state separately the facts found by him and his conclusions of law, and direct the judgment or decree to be entered thereupon, including a determination as to costs, and in common-law cases the finding as to the facts shall have the effect of a verdict of a jury."

3. Act of Mar. 3, 1901, ch. 854, 31 Stat. 1316, Sec. 768, D.C. Code 1940 Ed. Title 29, Sec. 701.

“When a majority of the trustees, directors, or other officers having the management of the concerns of any corporation in the District, or stockholders representing not less than one-third of the capital stock of any such corporation, discover that the property and effects of the corporation have been so far reduced, by losses or otherwise, that it will not be able to pay all just demands against it or offer a reasonable security to those who deal with it, or they shall deem it beneficial to the interests of the stockholders that the corporation be dissolved, or when such directors, trustees, or other officers are authorized by a majority of the stockholders to apply for a decree, as hereinafter provided, or when the objects of the corporation have wholly failed or are entirely abandoned or are impracticable, they may apply to the District Court of the United States for the District of Columbia by petition for the dissolution of said corporation.”

STATEMENT OF POINTS

- (1) The referee erred in appointing a counselor to advise him on matters of law and in allowing his counsel to arrogate to himself the functions of the referee, since both of these acts constituted an unlawful delegation of the referee's authority.
- (2) The referee's report is incomplete in that it fails to settle conclusively the whole matter referred, contains erroneous conclusions of law, and is not supported by the evidence which, in some instances, is directly contrary to the report.
- (3) The referee's report did not conform to the statute under which the reference was made in that it failed to state separately conclusions of fact and conclusions of law, and violated generally accepted principles of law by including, in addition to findings of fact and

law, other matter such as comment, surmise and repetition of evidence.

- (4) The referee's report and the testimony in the record indicate that the referee was biased against the appellant and prejudiced in favor of one of the appellees.
- (5) This Court should exercise its powers as an appellate court in an equity cause and grant the affirmative relief sought by the appellant in his Bill for Receiver, since the need for the receivership is substantiated by the record.

SUMMARY OF ARGUMENT

The appellant contends that the judgment of the court below, based upon and adopting the referee's report, was erroneous and should be overturned by this Honorable Court.

The first ground in support of this contention is the action of the referee in (1) appointing a lawyer to act as his counsel, and (2) tolerating that counsel's usurpation of the referee's powers. This, appellant contends, was an unauthorized delegation of the referee's authorities and duties.

The second ground goes to the substance of the referee's report, which, appellant contends, could not support the judgment of the lower court since it is not itself supported by the evidence. Two conclusions of law contained in the report in which the authority for certain acts of the appellant as president of the Stern Company of Washington is denied are clearly erroneous. The report, which was supposed to constitute an accounting and to settle the whole matter referred, is incomplete and deals only with certain isolated transactions, failing to strike a balance based upon *all* the financial relationships of the

parties. The award in favor of appellee Celia Stern is based solely on her own, self-contradictory testimony.

The third ground for the appellant's contention is that the referee's report did not conform to the statute governing the reference or to well-established principles of law. Contrary to the statute, the report does not state the conclusions of fact and conclusions of law *separately*. Also, the report is abundant with extraneous material such as surmise, argument, comment and repetition of part of the evidence.

The final ground on which the appellant contends that the judgment below should be reversed is that the referee was obviously biased against the appellant and prejudiced in favor of appellee Celia Stern. The record abounds with evidence of the referee's pique and irritation directed toward the appellant, culminating in his report which has all the earmarks of a punitive document rather than an objective, judicial determination. That the referee was prejudiced in favor of Celia Stern is evidenced by the fact that he had loaned her a substantial sum of money.

The appellant also contends that this court is not limited in its review function to merely reversing and remanding, but that it can and should exercise its powers and grant the affirmative relief requested by the appellant in his equitable action in the District Court. This Court has the jurisdiction to appoint a receiver even though the corporation is a foreign corporation. It has the power as an appellate court in an equity cause, which brings up the whole record for review, to do what the lower court might have done. It should appoint a receiver because the corporation is being mismanaged, its assets wasted and commingled with those of another corporation of which appellee Hyman Stern is president, and because the financial affairs of the parties arising out of their relationships to the corporation are so hopelessly tangled that a receivership offers the only means of working out the situation with equity for all.

ARGUMENT

I. The District Court Erred in Adopting the Referee's Award and in Giving Judgment Based Thereon.

A. *It Was Reversible Error for the Referee to Allow His Counsel, Authority for Whose Appointment Is in Doubt, to Usurp the Functions of the Referee at Various Stages of the Hearings.*

It is well settled law that proceedings before referees are to be conducted in accordance with the practice governing a trial by a judge. *Franklin Phosphate Co. v. International Harvester Co.*, 62 Fla. 185, 57 So. 206 (1911). When an agreement between the parties constitutes the Referee as the exclusive judge of the subject submitted to his decision, he has no power to delegate his authority, being substituted in the place of the judge. *Livezey v. Gorgas*, 4 Dall. 70, 1 L. Ed. 746 (U.S. 1800). In the instant case, the Referee did, in fact, delegate his authority in two ways: (1) He appointed a lawyer, David L. Blanken, Esq., to "guide me in regard to the rules of law and rules of evidence, and so on." (Joint Appendix, p. 94A). Later, these functions were enlarged to include the questioning of witnesses. (Joint Appendix, p. 94A). This was a delegation of the Referee's authority in that the stipulation of the parties and the order of the Court under which the reference was made provided that Referee Goldman was appointed "with full power and authority . . . to hear and determine the issues of law and fact involved in this cause. . . ." (Order referring case to Hymen Goldman, May 31, 1946.) While it was proper for the Referee to arrange for a stenographic report to be made of the hearings and equally proper to arrange for an examination of records by an accountant, both having been agreed upon in the Stipulation of the Parties to refer the case to Hymen Goldman, dated April 22, 1946, it was not proper to hire an attorney with the

power to guide the Referee in matters of law and to question witnesses, since the grant of these powers amounted to a delegation of some of the Referee's substantive authority, which was contrary to law.

(2) Even if the appointment of counsel and the duties assigned to him be found not to be error, the Referee allowed an outrageous usurpation of his own functions by his counsel, far in excess of the powers granted him. At various times during the hearing, Mr. Blanken engaged in direct discourse with the attorneys as if he were the referee. (Joint Appendix, p. 102A; p. 113A, 114A, 118A, 119A.) At other times, he actually made rulings in place of the Referee. (Joint Appendix p. 112A, 117A, 118A.) At least two of his unauthorized rulings are so far beyond the pale they would be reversible error even if made by the Referee. In Vol. XV at Page 185 the following appears: (Joint Appendix p. 114A-115A)

"Q Mr. Stern, did you ever make a statement in the presence of Mr. Gelfand, Mr. Blackman, Mr. Goldman, and Celia Stern, that the Stern Company was bankrupt and Abe Stern could have your stock?

A That necessitates a great deal of explanation.

Q Will (sic) did you ever make such a statement?

MR. BLANKEN. *Counsel hasn't objected, but the objection is sustained.*"

And in Vol. XVII, at Page 28, there is the following colloquy: (Joint Appendix, p. 118A)

"MR. FISCHER. Mr. David never made any objections until after you said it is ruled out.

MR. DAVID. I beg your pardon. The record will otherwise show.

MR. BLANKEN. Even if it were true, for the sake of the record we would still sustain an objection which *should* have been made; because the Referee intends to conduct this hearing properly, according to the rules of evidence."

Other instances appear in the record of Mr. Blanken's lack of impartiality and favoritism toward the counsel

for the defendants below. One such instance, in which Mr. Blanken was aided by the Referee, appears in Vol. XV. Mr. Fischer, counsel for Abram Stern, was cross-examining one of the defendants' witnesses. At Page 69, the following appears: (Joint Appendix, p. 111A)

"MR. FISCHER. Did you actually go to trial?

MR. DAVID. I object unless he shows the conviction.

REFEREE GOLDMAN. Don't answer questions as fast as they are asked. Think about it. You have a certain amount of personal privilege here.

MR. BLANKEN. Give your counsel time to object."

This constituted an outright coaching of defense counsel. Following Mr. Blanken's lead, the Referee contributed further coaching on Pages 70 and 71 as follows: (Joint Appendix p. 111A)

"REFEREE GOLDMAN. Go ahead and ask the questions. Now I want to direct the witness not to answer until his counsel can interpose an objection, if he wishes."

Other examples of Mr. Blanken's interference with counsel for Abram Stern in trying to make his case appear in Joint Appendix, p. 116A, 117A, where the following is found:

"BY MR. FISCHER:

Q Did you talk to Dany Frese, Joseph Sklagen, or Ida Stewart in regard to their payment of those notes?

MR. DAVID. I object to hearsay evidence. Let him bring the witnesses here.

MR. FISCHER. I am merely asking if he had a talk with them.

MR. BLANKEN. He can say he spoke to them. It will not do any good. Mr. David will object when you want him to repeat the conversations."

Also, see Joint Appendix, p. 118A, where Mr. Blanken again usurped the Referee's function by interjecting, during Mr. Fischer's questioning of a witness, the following:

"MR. BLANKEN. Mr. Fischer, might I suggest at this point that these questions are very leading. Suppose you let the witness testify."

All these interferences were from the man whose function was solely to guide the Referee in regard to the rules of law and evidence and who was to be permitted to question witnesses. Instead, however, it is clear from the cited illustrations and from a host of other instances throughout the record, that the counsel to the Referee was permitted by the Referee to arrogate to himself many of the most basic functions of the Referee and that he used them to the prejudice of the appellant, contrary to law.

B. The Referee's report contains erroneous conclusions of law, is incomplete, and neither it nor the judgment of the Court can be supported by the evidence, and are, in some instances, directly contrary to it.

1. At least two of the Referee's conclusions of law were clearly erroneous.

On page 3 of the Referee's report, the Referee found that the appellant had removed many of the records of the corporation to his home and kept them in the basement, and he found that "certainly their removal from the offices of the corporation was without any authority." This conclusion was erroneous, since the appellant was, at that time, the president of the corporation, and, as its chief executive, could run the business in any way he saw fit consistent with the general principles of corporate officership. *Fletcher, Corporations*, (Permanent Ed.) Secs. 553, 559; *Newbold v. Brennan Construction Co.*, 48 App. D.C. 90 (1918). Unless the mere act of removing the records to his home can be shown to be deleterious to the interests of the corporation and the stockholders, unless it can be coupled with some evil motive such as fraud, from which harm to the corporation was intended or might have been expected, it cannot be said to be

without any authority since all of the executive authority to conduct the affairs of the company were vested in the president. Nothing in the corporation's charter or by-laws prohibited or was even inconsistent with this act.

On Page 5 of the Referee's report, in discussing assignments made by the appellant to creditors of the corporation, the Referee found as follows:

"All of these assignments were made without reference to any shareholder in the corporation and without submitting the matter to the directors. The referee finds from all of the evidence that there was no authority in law for these assignments and that Mr. Abram E. Stern exceeded his authority."

The Referee did not cite any basis for his finding that there was no authority in law for these assignments, and indeed, there was no basis since this point had never been discussed or argued during the hearings. However, a study of authorities shows that the appellant did have the authority, as president of the corporation, to make these assignments. It is elementary that the day-to-day business affairs of a corporation are to be carried out by its officers under policies established by the board of directors. The principal officer of a corporation, generally, is the president; his powers, unless specifically prescribed, are general, and encompass any and all acts necessary in the normal business of the corporation. In this case, the generality of the powers of the president is made plain by reference to the by-laws of the company. In the paragraph headed "Duties of Officers" it is stated that "The President shall be the executive officer of the company:". Nothing more is said about his duties. But in dealing with the duties of the other officers the by-laws are much more specific. In fact, the duties of the other officers are quite definitely spelled out and are limited thereby.

In this jurisdiction, it has been held that formal proceedings by a corporation are not necessary to give an officer or agent authority to execute and deliver a promissory note in the name of a corporation. *Washington Times Company v. Wilder*, 12 App. D.C. 62 (1898). To the same effect, where the purpose is merely that of procuring funds to conduct the general business of the company, *La Normandie Hotel Co. v. Security Trust Co.*, 38 App. D.C. 187 (1912). In the instant case, the assignments were of notes payable to the Stern Company of Washington by its vendees, and they were made to protect persons who had loaned substantial sums of money to the Stern Company for use in its general business. The mere fact that the president of the company here assigned another's promissory note instead of executing a new one is hardly enough to distinguish this case from the rule in *Washington Times Co. v. Wilder*, supra. The purpose of the borrowings by the appellant was clearly for the general use of the company in conducting its business, thus bringing them within the *La Normandie* case, supra. Thus, the assignments made by the appellant were not in excess of his authority but were well within his natural and normal powers as the executive officer of the company. The fact that they were made without reference to any other shareholder is immaterial since corporate officers are never required to consult with shareholders regarding the ordinary, day-to-day conduct of the business. Nor is his failure to consult with the board of directors material since at the time the assignments were made the board of directors had ceased to exist as a practical matter, the entire responsibility for the management of the corporation having devolved upon the appellant. Some of the assignments were made to himself to cover moneys he had loaned the company, which is also permissible. *Twin-Lick Oil Co. v. Marbury*, 91 U.S. 587 (1875); *Jackman v. Newbold*, 28 F.2d 107 (C.A.A. 8th 1928). The effect of these assignments, ignored by the Referee, was binding

on the corporation. *Fleckner v. Bank of U.S.*, 8 Wheat. 338 (U.S. 1823); *Smith v. Robins*, 236 F. 114 (C.C.A. 8th 1916).

2. *Although the Referee's acknowledged duty was to render an accounting (Joint Appendix, p. 94A) he has failed to do so and has merely made an award based upon certain isolated transactions.*

An award under a general reference must decide the whole matter submitted. *Carnochan v. Christie*, 11 Wheat. 446 (U.S. 1826). In that case the Court held the award invalid because it did not settle the accounts between the parties. The award ought to settle finally and conclusively *the whole matter referred*. An accounting is the making up and rendition of an account, and may be, as in the case at bar, by the order of the court. An account is defined as a detailed statement of the mutual demands in the nature of debt and credit between parties, arising out of contracts or some fiduciary relation. *Black's Law Dictionary* (Third Edition, 1933). An accounting imports an adjustment of the accounts of the parties and a rendition of a judgment for the balance ascertained to be due. *Apple v. Smith*, 106 Kan. 717, 190 P. 8 (1920). It usually consists of striking a balance between debits and credits showing a balance due, if any. *Peoples Finance & Thrift Co. of Visalia v. Bowman*, 58 Cal. App. 2d 729, 137 P. 2d 729 (1943.)

In the instant case, it is submitted, no balance has been ascertained as between the parties in their relationships to each other through the corporation and to the corporation. The award has not settled finally the whole matter referred. The Referee has ignored the outstanding checks of the Stern Company of Washington, exchanged by the appellant for loans to the company, and thus has left this important element of the accounting unsettled. Certain individual transactions have been isolated by the Referee's

report and dealt with without regard to their connection with all the multitude of other transactions going to make up the whole tangled web of financial transactions of The Stern Company of Washington and of Abram, Hymen and Celia Stern over a period of years. These isolated transactions have been utilized as a basis for the award against the appellant.

Indeed, it is not difficult to understand why the Referee withdrew from any effort to render an orderly accounting out of the chaotic accounts of the parties and turned instead to the easier and simpler method of basing an award on the few transactions which could be conveniently pin-pointed, ignoring their relationship to all other transactions. The accounts and records of the Stern Company of Washington are a marvel of complexity and incompleteness. All witnesses for all sides are agreed on this very basic point, i.e., that the books and records are "incomplete," "missing," "poorly kept," "hazy," and "mixed up." (Joint Appendix, p. 95A: 101A, 102A, 103A, 104A, 109A, 110A: 111A, 112A) In fact, the Referee's accountant in his report to the Referee, states:

"The books and records were found to be inadequate and incomplete . . . and consequently did not permit us to express an opinion as to whether the information considered as a whole presents the correct financial operations of the Corporation." (Accountant's Report, Page 4).

Another warning appears on Page 6 of the same report where the accountant describes the forthcoming information as being "presented herewith for what it may be worth." In closing his report, the Referee's accountant offers a third warning:

"It is obvious that such results as were obtained were pieced together from incomplete, poorly kept records which precluded a proper certification." (Accountant's Report, Page 10).

These statements, from the Referee's own accountant, negative any possibility of an accounting in the true legal sense having been rendered. Yet, the Referee has chosen to fly in the face of these compelling statements and make awards, clothed as an accounting, which lack the important principle of a balance having been struck. The Referee admitted the complete failure of all attempts to arrive at an accurate audit of the company's finances (Referee's Report, Page 2.) but, undeterred by his own admission, nevertheless went on to make specific awards. In the face of the undisputed evidence in the record as to the incompleteness of the books and records, coupled with the accountant's evaluation and the Referee's admission to the same effect, the Referee should have found that no fair accounting on which awards could be based was possible. The awards made cannot be substantiated by the evidence because, as everyone agrees, the evidence was incomplete. The Referee could not have found, as he did, that specific sums were owed the corporation by the appellant without violating two fundamental points: (i) taking into account and balancing off other transactions submitted in evidence having a direct bearing on the case but ignored by the Referee, and (ii) ignoring the significance of the incomplete, muddled state of the books and records and choosing to base the award on only those transactions most easily provable. In either case, the net result is not an accounting since there is no balance struck. What is left, then, is nothing more than a punitive award against the appellant which this Court must strike down.

3. *The Referee made a specific award to appellee Celia Stern, based solely upon her own testimony which was self-contradictory on the very point involved.*

On Page 8 of the Referee's report, a finding is made that Celia Stern made a claim for merchandise in the sum of \$6700 alleged to have been turned over by her to The Stern Company of Washington for which she had

never received payment. The Referee then allowed the claim, without citing the basis in the record for coming to that conclusion.

The only testimony regarding this claim was offered by Celia Stern, and, like much of her testimony throughout the record, it is self-contradictory. In Vol. II of the Transcript, starting at Page 89-A, Celia Stern stated that she left the Stern Company at one time, took possession of a nearby building and ran a business known as the Acme Sales Company under an arrangement whereby it was to be regarded as a sort of department of The Stern Company, and was to be run for that company's benefit. (Joint Appendix, p. 100A) However, she testified that she put her own money into the enterprise. Her mother died shortly thereafter, and she decided she would never return to the Acme Company. The management of that enterprise was then restored to Abram Stern. Celia Stern testified that she then offered the stock (merchandise) of Acme to her brother, Hymen, but that he refused it and suggested she turn it over to Abram Stern, which she did. She further stated she received no money for it. Upon being asked how much she had invested in the business, she replied:

"Something over \$5000; I do not know exactly what it was." (Joint Appendix, p. 100A)

Further questioning on this transaction elicited much the same reply—that she had turned over all the merchandise of Acme to Abram Stern, and that the amount of the merchandise turned over was "Something over \$5000; Mrs. White was there and can tell you." (Joint Appendix, p. 100A-101A.) However, in Vol. VII of the Transcript, while being questioned further by her own counsel, Celia Stern made a major change in her testimony. When asked how much her stock of goods was worth, she replied:

"My merchandise taken over was worth about \$6700, less than it cost me." (Joint Appendix, p. 105A)

Then, in talking about having a separate business, she made a very important admission, saying:

"That is right; I drew money out of *the business* and went in business for myself." (Joint Appendix, p. 105A)

Thus, in characterizing her testimony on this point, it appears that one statement was made to the effect that she invested approximately \$5000 of her own funds in Acme but did not know exactly how much, a second statement was made to the effect that the merchandise was worth about \$6700 which was less than cost, and a third statement was made that she had used Stern Company funds to finance the new enterprise. Since this last statement tallies with her earlier testimony to the effect that Acme was to be run as a department and for the benefit of the Stern Company it is hard to understand on what basis the Referee could have made the specific award in her favor of \$6700, especially since her own testimony on the amount involved, which forms the sole basis for the award, was inconsistent. And, although Mrs. White, the only disinterested person who could have given any further information about this transaction, was interrogated exhaustively during the hearings, no effort was made by the Referee to elicit any information from her which might have corroborated or contradicted Celia Stern's testimony. Instead, the Referee was content to make a substantial award to Celia Stern on nothing stronger than the evidence stated above. This consisted of the flimsiest kind of confused, self-contradictory statements from a witness whose testimony throughout the hearings was marked by self-contradiction. (See Joint Appendix, p. 109A-110A; Vol. XIII, Pages 62.) While the general rule is that evidence uncontradicted by direct testimony is to be believed, this is not the case when it

is contradictory within itself. *Quock Ting v. United States*, 140 U.S. 417, 35 L. Ed. 501 (1891). In this jurisdiction, it has been held that, in weighing testimony, the courts are not bound to believe facts testified to, *especially by an interested witness*, merely because he may not have been directly contradicted. *Thurston v. McClellan*, 34 App. D.C. 294 (1910). Here the witness was certainly not a disinterested one. Her statements constitute self-impeachment and an award to her on such a basis is wrong as a matter of law and cannot be sustained. Even if the other relief requested of this Honorable Court not be granted, it is submitted that this portion of the judgment at least should be reversed.

C. The Referee's report did not meet the formal requirements of the statute under which reference was made, nor was it in conformance with well-established principles of law.

The statute under which the reference was made provides that the final award of the Referee shall state separately the facts found by him and his conclusions of law and direct the judgment or decree to be entered thereupon. Act of Mar. 3, 1901, 31 Stat. 1255, ch. 854, Sec. 417, D.C. Code, Title 16, Sec. 1706. Also, it is well settled law that the reports of referees should not contain either evidence or argument or comment, but should consist only of findings of fact or law. In *Bailey v. District of Columbia*, 9 App. D.C. 360 (1896), rev'd on other grounds, 171 U.S. 161, 43 L. Ed. 118 (1898), this Court said:

"The testimony is no part of the award of an arbitrator; nor is it any part of the report of a referee, unless specifically so made by the report itself, or it has been directed by the order of reference to be returned to the Court. This we regard so well settled as to need no citation of authority in support of it. We presume that no authority can be found in opposition to it. *It is the duty of a referee to report*

facts, not the testimony by which such facts are established."

There should be conclusions of fact from the evidence and conclusions of law from the facts found. *Glacius v. Black*, 50 NY 145, 10 Am. Rep. 449 (1872).

It is clear that the Referee's award in this case did not meet either the statutory test or the common law one. While his report is entitled "Referee's Award, Finding of Fact and Conclusions of Law," there is, in fact, no separation between the findings of fact and conclusions of law. At the top of Page 3, after having described a few brief facts, the Referee stated that "Certain conclusions, however, are inescapable, and your referee finds as follows: "This very statement indicates that, in the referee's mind, findings of fact and conclusions of law were hopelessly mixed. Is the natural assumption to be drawn from that statement that the conclusions are to support the findings that follow? If so, that is directly contrary to what was required of the Referee.

In any event, there is a wealth of material in the report that cannot be described as either findings of fact or conclusions of law. Some of it is mere surmise, as in the paragraph on Page 4 dealing with the appellant's claim for back pay, where the Referee states:

"It seems fantastic, to say the least, that if the plaintiff claims the amount of \$36,000, he only asked for an amount of no less than \$3340.00 at the time of the filing of the suit, which was sworn to."

Here, the Referee is trying to bolster his result by argument addressed to himself. Much of it is mere repetition of the evidence itself, as in the material dealing with the "claim" of A. Edwin Stern, Jr. beginning at the bottom of Page 6 and continuing to the middle of Page 8, and in the material concerning the so-called Ottenberg trans-

action, commencing at the bottom of Page 9 and continuing to the bottom of Page 10. Still other parts of the award consist of comment, most of it exhibiting a prejudicial attitude toward the appellant, as in the third full paragraph of Page 2, where the Referee criticizes lack of candor and cooperation, and at the end of the paragraph preceding the first full paragraph on Page 6, where the Referee characterized the testimony of the appellant as "vague, indefinite, and impertinent." The Referee has even committed one glaring error of fact in his report by citing Vol. I, Pages 68, 72 as the source of Mr. Louis Ottenberg's testimony, when, in fact, that testimony appears in Vol. VI, Pages 2 through 9. While it is not argued that this error has any bearing on the substantive effect of the testimony, it is submitted that the error is representative of a careless attitude toward and inaccuracy with facts which affected the Referee's entire treatment of the case. This is borne out by his treatment of the testimony of witnesses for the plaintiff below, A. Edwin Stern, Jr., Frances Kovan, Adele Stern, and Hanna Rose Alexander in construing that testimony to be in support of claims on the part of those witnesses against the Stern Company of Washington, D. C. (Referee's award, Page 6). In fact, all the testimony of these witnesses, found in Vol. XVI, Pages 94-133, 148-200) of the Transcript was offered merely to prove a course of dealings between them and the Stern Company in support of appellant's actions in assigning the notes and conditional bills of sale to these persons or to himself in behalf of these persons. Finally, the very fact that a number of particular transactions, including this Ottenberg transaction, were culled out of the whole mass of testimony involving the transactions of the Stern Company over a period of years as a basis for the award against the appellant indicates beyond doubt a misconception on the part of the Referee as to his proper function. This function was to render an accounting of

all the transactions of the parties relevant to the cause over the period in question, and to arrive at a balancing out of such transactions as a basis for a conclusion as to the parties' debt and credit relationships with one another. Here, the Referee has failed to render an accounting but has recommended an award based on certain isolated transactions which were more readily separable and identifiable, ignoring all the other less easily provable financial relationships which went into the making up of the financial relationships of the parties on the whole.

D. The Referee exhibited bias against the appellant and prejudice in favor of at least one of the appellees.

It is basic to the law governing referees that a Referee be free from bias or prejudice and be indifferent as between the parties. In a leading case on this point, *State ex. rel. Wright v. McQuillan*, 257 Mo. 334, 158 S.W. 652 (1913), the Court had this to say:

"A referee is but an arm of the Court, created by the Court to do things which the Court could itself do but for the inconvenience and time. His qualifications should be along the lines of those required of a trial judge, because he performs duties that otherwise would have to be performed by such judge. Not only should his qualifications be along lines of those required of the trial judge, but the things which disqualify the one to act should disqualify the other. Bias or prejudice has always disqualified the judge. . . ."

And in *Kirk v. Douglas*, 192 S. Car. 359, 6 S.E. 2d 757 (1940), the Court said:

"It goes without saying that a referee must be a disinterested person, and that any interest or reason, the probable and actual tendency of which is to create a bias for or against a party to the cause, is sufficient to disqualify him. The disqualifying interest need not be of a pecuniary nature, but it must be of a

character calculated to impair his impartiality and sway his judgment."

In this case, it is clear from the record that the Referee was not unbiased, but that he was, in fact, prejudiced in favor of at least one of the defendants below and unfavorably biased in his attitude toward the appellant. In his report, he accused the appellant of having withheld much of the information which was necessary to a proper solution of the problem and says he lacked candor or cooperation, refused to obey the orders of the Referee, was impertinent in his testimony. That the Referee was prejudiced in behalf of appellee Celia Stern is evidenced by the fact that during the period for which the accounting was being rendered he had actually loaned her a substantial sum of money. (Joint Appendix, p. 100A, 116A). This fact alone precluded the Referee from being "indifferent as between the parties." It would have constituted ample grounds for a judge to disqualify himself from sitting, and would constitute reversible error if he did not disqualify himself. It is equally reversible error here. There is no conflict of evidence about the loan having been made, since it is admitted by the Referee in his Opposition to Plaintiff's Motion to Set Aside Award.

But there are many more grounds upon which to bottom the charges of prejudice and bias on the part of the Referee. In Vol. X of the Transcript, at Page 119, when the appellant was being questioned by Mr. David and objected to certain questions being asked him, the Referee interpolated the following:

"REFEREE GOLDMAN . . . Mr. Stern you have been in business for a long time, and without my questioning your veracity—

MR. STERN (interposing) I hope not.

REFEREE GOLDMAN (continuing) I still feel that when you took all those notes away, you certainly must have made some record as to the amount of the balance on each note. You cannot tell me.

I have a perfect right to make up my mind; the way I feel, you cannot tell me you took a certain amount of notes without knowing how much each one of those persons owed on those notes, and made settlements. . . ." (Joint Appendix, p. 106A).

Although the Referee spoke of having a right to make up his mind the foregoing exchange indicates he had already made it up and that his mind was closed against the appellant. This is further substantiated by the Referee's statement appearing in Vol. XVIII, at Page 72. Such an attitude as is here displayed by the Referee made the submission of evidence by the appellant relatively useless.

Again, in the same Volume X at Pages 122-123, counsel for the defendants below was requesting the Referee to require the plaintiff below to deposit in a trust fund certain moneys he had collected on Stern Company notes which he had assigned to alleged creditors of the Stern Company in payment of its obligations. Counsel for both sides argued the point briefly, developing the issue, which was whether these moneys were, in fact, the property of the Stern Company or whether they rightfully belonged to the people to whom they had been assigned. Whereupon the Referee, at the bottom of Page 123, stated:

"Mr. Fischer, you don't deny this money is the property of the Stern Company of Washington and Abram E. Stern is merely the trustee, a self-elected trustee." (Joint Appendix, p. 107A)

This statement pre-judges the very issue that was being tried and demonstrates the Referee's closed mind regarding it.

The mental attitude of the Referee is further demonstrated on Page 125 of Vol. X where he commented: (Joint Appendix, p. 107A):

"On several occasions, we have asked Mr. Stern what dispositions he has made of these collections, whether or not he has kept the money; and if not what he has done with it. That information has never been supplied, so we have to assume he has kept it."

This assumption is founded on nothing more than pique and irritation toward the appellant and is wholly unsupported by logic or evidence.

Another illustration of the Referee's turn of mind is found in Vol. XVI at Page 21 where the plaintiff below, upon being asked by counsel for the defendants below to "explain the Westbrook account," replied, "Well, Mr. Westbrook was here and he testified." To this, counsel for defendants below objected to "the witness reciting what another witness testified," and the Referee said, "You testify for yourself. We know what he testified here."

This irritation on the part of the Referee at the appellant is reflected throughout the record and culminates in the Referee's report, which has the tone of a punishment being meted out to the appellant in return for his being something less than a model witness. If appellant did, in fact, misbehave during the course of the hearings, the proper recourse for the Referee was the contempt power and not the Referee's report as the vehicle for punishment. That it has been so used is apparent.

II. This Honorable Court should, in the exercise of its powers as an appellate court in an equity cause, grant the relief requested by the appellant in his action below and appoint a receiver to take over, administer and dispose of the assets of the appellee corporation.

Any question as to the jurisdiction of the courts of the District of Columbia to grant the relief sought where the corporation is incorporated outside the District of

Columbia is resolved by reference to *Saltz v. Saltz Bros.*, 65 App. D.C. 393, 84 F. 2d 246 (1936), cert. den., 299 U.S. 567, 81 L. Ed. 418 (1936). On the point of jurisdiction, this court held that where a corporation's charter had been forfeited, that all the assets of the corporation are located in the District of Columbia, that its business is all carried on in the District of Columbia, that its connection with the foreign state was intended to be nominal, and that all parties in interest were before the court, the District of Columbia court had jurisdiction to appoint a receiver.

The leading case in support of the proposition that this court can act affirmatively in granting the relief sought from the lower court is *Keller v. Potomac Electric Power Company*, 261 U.S. 428, 67 L. Ed. 731 (1923). In that case, the Supreme Court held that in equity procedure, an appeal brings up the whole record and the appellate court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made. This rule has been followed in numerous other Supreme Court and inferior Federal court cases. It being clear that this Court has the power to appoint a receiver it remains to establish why the receiver should be appointed.

Again, the *Saltz* case furnishes an indication of this court's views on the question of when it is proper for a receiver to be appointed for a corporation. In that case, the entire stock of the corporation was owned half and half by the two contesting parties. They could not agree on the conduct of the business, and this seriously threatened to disrupt the enterprise. The court, considering these factors, held that this was a good case for receivership, particularly because neither side could impose its views on the other. The court also mentioned such other factors as the hostility between the parties, the refusal to make moneys available for the operation of the corpo-

ration, the efforts to oust the then existing officers and directors and elect new ones, in short, the harassment of management, in deciding that a receivership should be granted.

A receivership should be appointed in the case at bar because the evidence clearly shows mismanagement of the affairs of the corporation with a concomitant endangering of the value of the appellant's interest therein. While this case is not on all fours with the *Saltz* case, it comes close enough to be controlled by it. Here, only three persons have any interest or concern in the question of receivership. They are the appellant, Abram E. Stern, and the appellees Hymen Stern and Celia Stern. Each owns one-third of the corporation. The appellant, although a minority shareholder, is a substantial shareholder and would qualify under Act of March 3, 1901, c. 854, 31 Stat. 1316, Sec. 768 D.C. Code, 1940 Edition, Title 29, Section 701 to bring an action for dissolution. Thus, he does not stand as an individual seeking to impose his will on a large number of other shareholders. The record shows that at the time of the filing of the Bill for Receiver, the appellees had harassed the appellant in every way possible in his management of the corporation. Since the appellees' accession in management in 1945, they have ejected appellant from all participation in the conduct of the affairs of the company. The bitterness of the family fight, the dissension existing between brother and sister, are still very much present.

A receiver for a corporation may be appointed for many reasons, such as for aid in obtaining an accounting, for preservation of books and records, against possible destruction, and to take possession of corporate assets pending election of a disinterested and competent board of directors. *Orth v. Transit Investment Corp.*, 132 F. 2d 938 (C.C.A. 3d 1942). It has been held in this

jurisdiction that a bill for receiver may be brought on other than statutory grounds for the dissolution of the corporation. *National Benefit Life Insurance Co. et al. v. Shaw Walker Co. et al.*, 71 App. D.C. 276, 111 F. 2d 497 (1940). In that case, the District Court granted a receivership in a statutory dissolution proceeding, overruling its own earlier decree setting up a receivership in other than a dissolution proceeding on the ground that it had lacked jurisdiction in the earlier case. On appeal, it was held that the second receivership was void, the District Court having had jurisdiction in a general equity sense to grant the first receivership. The Court went on to say that a typical example of where a bill for receiver on other than statutory dissolution grounds may be brought is one where the corporation's financial condition is so obscure that no one could know what it actually was. The objects of the bill in the cited case were (1) to preserve the corporate assets; (2) to ascertain the corporation's true financial condition; and (3) to secure ultimate relief either by liquidation and distribution or otherwise as the facts and equities of the case, when ascertained, should disclose to be proper. These objects can also be applied with perfect propriety to fit the case at bar. The financial condition of The Stern Company of Washington is hopelessly muddled, as testified to by all the witnesses during the hearings. It can only be brought into a semblance of order by the appointment of a disinterested receiver, who will act for the benefit of the corporation and the shareholders as a whole and not to the benefit of any individual shareholder. The corporate assets are in need of being preserved, since the corporation is now being mismanaged and the assets imperiled. The very nature of the bitter intra-family hatred precludes any possibility of the corporation being managed for the benefit of *all* the stockholders by a disinterested board of directors. The opposite is much more

likely to be the result. The record discloses that Hymen Stern is principally engaged in business in Norfolk where he runs the M. E. Stern Company, and it follows that the Stern Company of Washington receives little or no benefit from his ownership of it nor his office in it. In effect, the entire conduct and management of the affairs of the Stern Company of Washington rest with appellee Celia Stern and it is amply demonstrated throughout the record that she is incapable of successfully managing the company. For example, she has commingled the corporate funds with her own by depositing them in her own personal bank account (Joint Appendix, pp. 97A-99A): she has engaged in a course of dealings with her brother Hymen Stern, whereby the assets of the Stern Company of Washington are being used in conjunction with the M. E. Stern Company of Norfolk in such a way that it is impossible to tell whether the assets of the Stern Company of Washington are being properly protected or are being dissipated (Joint Appendix, pp. 96A-97A, 99A-100A): she has failed to hold any stockholders' meetings from the time she assumed control (Joint Appendix, p. 107A, 116A): she has failed to pursue diligently the collection of assets belonging to the corporation.

As officers and directors of the corporation, both Celia Stern and Hymen Stern have failed to live up to the standards required by law of corporate officers and directors. Their first duty is to act in behalf of the corporation and its management. The directors and officers of a corporation occupy a fiduciary relation to the corporation and its shareholders. They undertake to exercise the powers conferred upon them solely in the interests of the corporation or the shareholders as a body and not for their personal interests. They cannot engage in a competing business to the detriment of the

corporation which they represent. *McGourkey v. Toledo & Ohio Central Ry. Co.*, 146 U.S. 536, 36 L. Ed. 1079 (1892). All of these principles are violated by the appellees in the dealings between The Stern Company of Washington and the M. E. Stern Company of Norfolk (Joint Appendix, pp. 96A-97A, 99A-100A), which may be for the mutual benefit of the individuals concerned but cannot redound to the benefit of the appellant. A leading case on this point is *Geddes v. Anaconda Mining Co.*, 254 U.S. 590, 65 L. Ed. 425 (1921), wherein the Supreme Court held that the relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged, the burden is upon those who would maintain them to show their entire fairness, and where a sale is involved, the full adequacy of the consideration. These transactions between Celia Stern and Hymen Stern, both of whom were directors of The Stern Company of Washington, were challenged by the appellant during the course of the hearings, but the Referee failed to require the appellees to prove their fairness. Since it is clear that shareholders of a corporation may obtain relief in equity against the officers of a corporation who wrongfully deal with its property to the injury of the shareholders, and since the appellant has been injured by the wrongful acts of the appellees in the form of having his share of the corporate assets diminished and the failure of the corporation to pay dividends, a receiver should be appointed for the Stern Company of Washington, as requested by the appellant, for the benefit of the shareholders of the corporation.

CONCLUSION AND REQUEST FOR RELIEF

From the foregoing, it is evident that the cumulative effect of the errors committed by the Referee in his conduct of the case have resulted in an erroneous judgment whereby the appellant is punished and the affairs of the corporation are left in as tangled a condition as they were before the Referee commenced hearings. The situation is one where a receivership is obviously desirable from the corporation's standpoint because it is the best method of straightening out on an equitable basis the complicated financial relationships of the three owners of the corporation with each other and with the corporation. The appellant therefore respectfully requests this Honorable Court either (1) to reverse the judgment of the lower court and appoint a receiver for the Stern Company of Washington to administer and dispose of the assets of the corporation, or (2) to reverse the judgment of the lower court and remand the case with instructions for a new reference to a disinterested referee.

Respectfully submitted,

A. L. WHEELER

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Attorneys for Appellant

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,335

ABRAM E. STERN, *Appellant*,

vs.

THE STERN COMPANY OF WASHINGTON, D. C.,
HYMEN STERN, CELIA STERN, *Appellees*.

Appeal from the United States District Court
for the District of Columbia

JOINT APPENDIX

1 Filed Aug 19 1942 Charles E. Stewart, Clerk

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

ABRAM E. STERN,
629 Indiana Avenue, N. W.,
Washington, D. C.,

Plaintiff,

vs.

THE STERN COMPANY OF WASHINGTON, D. C.,
629-631 Indiana Avenue, N. W.,
Washington, D. C.,

HYMEN STERN,
500 Market Street,
Norfolk, Virginia,

CELIA STERN,
1411 Hamilton St., N. W.,
Washington, D. C.,

Defendants.

No. 16833

Bill for Receiver

The complaint of the above named plaintiff shows:

1. Jurisdiction is based upon the fact that the amount involved herein exceeds the sum of \$3,000.00, exclusive of interest and costs.

2. The plaintiff, a resident of the District of Columbia, brings this suit in his own right as owner of record of 23½ shares of the defendant corporation and as a creditor of such corporation. The defendant, Hymen
2 Stern, is sued in his own right as a holder of record of 23½ shares of the said corporation; the defendant, Celia Stern, is sued in her own right. The

defendant, Hymen Stern, is a resident of the City of Norfolk, State of Virginia; the defendant, Celia Stern, is a resident of the District of Columbia. The defendant, The Stern Company of Washington, D. C., is a pro forma corporation originally organized under the laws of the State of Delaware, located exclusively in the District of Columbia.

3. For a long number of years prior to the 17th day of April, 1925, the plaintiff, Abram E. Stern, and the defendant, Hymen Stern, and Helene Stern, the mother of plaintiff and the said defendants, were engaged under the name of The Stern Company, and prior to that under the name of the Washington Showcase Exchange, in the store and buildings known as 629-631 Indiana Avenue, Northwest, Washington, D. C., in the conduct of the wood-working, sheet and glass factories and showcase and business equipment and household furnishings, as partners, the said Helene Stern taking no active part in said business, the conduct, management and operation thereof being with the plaintiff and the defendant, Hymen Stern. Title to the real estate hereinafter described and referred to and copartnership assets were in the name of the mother, Helene Stern.

4. Continued controversies, quarrels and bickerings between the plaintiff and the said Hymen Stern respecting the manner of conducting the said business were such that it was finally agreed that the said business should be organized into a corporation and the assets of
3 the said copartnership and the said real estate should be conveyed to the said corporation.

5. In accordance with such agreement there was executed and acknowledged the 23rd day of February, 1925, a Certificate of Incorporation for said defendant company by the said Helene Stern, defendant Hymen Stern, and this plaintiff, which, however, was not filed in the Office

of the Secretary of State of Delaware until the 17th day of April, 1925, nor was any action taken in respect to the further organization of the said corporation until a meeting held the 18th day of November, 1925, at which the said Helene Stern was elected President, the plaintiff, Abram E. Stern, Vice-President, Nathan Cayton as Secretary, and Milton B. Thomas as director. Owing to the fact that the said defendant, Hymen Stern, had absented himself from the said business and refused to participate in the conduct thereof, no further meetings of shareholders or officers were held until the 27th day of May, 1927, at which time the said Helene Stern was elected President, the plaintiff Vice-President, Hymen Stern as Secretary-Treasurer, and Milton Strasburger and Alexander Wolf members of the Board of Directors, and plaintiff avers that since the said 27th day of May, 1927, some fifteen years, there has been no formal or other meeting continuing the organization or conduct of the said corporation by its directors or shareholders, but the business of said corporation at times has been conducted by plaintiff and the said Hymen Stern, and

4 during the last four or five years by this plaintiff alone, the said Hymen Stern having entered into other enterprises and since the year 1940 resided and has become interested in and conducts a business of similar character located in the City of Norfolk, Virginia, which he and the defendant Celia Stern inherited from their deceased brother, Max E. Stern.

6. Plaintiff, however, avers that at various times when it became necessary to execute or renew mortgages upon the real estate hereinafter referred to or to make a sale and conveyance thereof, this plaintiff as Vice-President and the said Hymen Stern as Secretary have signed certificates prepared by the title companies certifying that the resolution authorizing the conveyance was duly passed and adopted by the Board of Directors of the

defendant corporation, but nothing appears upon the records of the said corporation to that effect. And plaintiff avers that the conduct of the said business and disposition of its assets as between plaintiff and the defendant, Hymen Stern, have reverted to and been carried on practically as a partnership.

7. That at the time of its incorporation, the assets of the said defendant corporation as assigned, transferred and conveyed to it, consisted among others of the showcase and equipment business conducted in the said premises 629-631 Indiana Avenue, Northwest, with all the stock in trade contained in the said premises, book accounts and promissory notes connected therewith,
 5 and all machinery, merchandise and equipment, as also the follownig real estate situate in the City of Washington, District of Columbia, described as Lots 15, 16 and 17, in Joseph B. Varnum and others' subdivision of part of Square 458, as per plat recorded in Liber C.H.V., folio 371, of the Records of the Office of the Surveyor of the District of Columbia; also lots 6 and 7, and lots 803 to 821, both inclusive, in square 700, in the District of Columbia, the said lots now being known as lots 40, 41, 42, 803 and 867, in said square.

8. Helene Stern, the mother of the plaintiff and the defendants Hymen Stern and Celia Stern, departed this life the 23rd day of November, 1940. In and by her will duly admitted to probate in the Probate Branch of this Honorable Court, she nominated and appointed this plaintiff and the said Hymen Stern executors thereof, who qualified as such. The administration of the said estate has not been finally settled and closed on account of controversies with the authorities as to the amounts of Federal and District of Columbia estate taxes, and because thereof there has been no distribution or payment of the legacies bequeathed thereby or executors' commissions and other expenses.

9. According to the stock book of said defendant corporation there was issued on the 19th day of November, 1925, in the name of Helene Stern, certificate No. 1 for 51 shares of said company; to this plaintiff, Abram E. Stern, certificate No. 2 for $23\frac{1}{2}$ shares; to the defendant, 6 Hymen Stern, certificate No. 3 for $23\frac{1}{2}$ shares; to Mr. Nathan Cayton certificate No. 4 for 1 share, and to Mr. Milton B. Thomas certificate No. 5 for 1 share. On May 27, 1937, certificate No. 4 issued to Nathan Cayton for one share was transferred to Milton Strasburger, to whom was issued in lieu thereof certificate No. 6 for one share; certificate No. 5 issued to Milton B. Thomas for one share was transferred to Alexander Wolf, to whom certificate No. 7 was issued for one share, the certificates numbered 4 and 5 upon the aforesaid transfers being cancelled. No other transfers of shares appear on the said stock book, the certificates to said Helene Stern, to this plaintiff, to the defendant, Hymen Stern, and to Milton Strasburger and Alexander Wolf being outstanding and constituting the whole stock issue of the said defendant corporation, which consists of 100 shares of no par value. The certificates to the said Milton Strasburger and Alexander Wolf for one share each were issued to them because of the fact that they were the attorneys for the respective parties and only to qualify them as directors, one share of said holding being the property of this plaintiff and the other share the property of the defendant, Hymen Stern. Neither of the aforesaid shareholders has taken any part in the affairs of the defendant corporation practically since its organization. Mr. Alexander Wolf has been deceased for a long number of years. The whereabouts of the said two shares is unknown to this plaintiff.

7 10. The defendant, The Stern Company of Washington, D. C., while incorporated under the laws of the State of Delaware, as hereinafter set forth

in detail, has had and maintained its entire business and assets and conducted its business in the City of Washington, District of Columbia, in and upon the premises numbered 629-631 Indiana Avenue, N. W., Washington, D. C. All of its assets, consisting of stock in trade, accounts receivable, cash on hand and in banks, fixtures and paraphernalia of trade, as well as the real estate owned by the said corporation, are within the District of Columbia. Plaintiff avers that whilst the said Stern Company of Washington, D. C. was originally for its convenience and purposes incorporated under the laws of the State of Delaware, nevertheless in truth and as a matter of fact and to all legal intents and purposes, it is a concern purely local to the District of Columbia, having its property, affairs and concerns and doing its business wholly within the said District of Columbia.

11. The real estate now standing in the name of defendant corporation is known as Lots 40, 41, 42, 803 and 867, in square 700, lots 40 and 42, 803 and 867 in said square being subject to an encumbrance of \$18,000.00; also lots 15, 16, 17 and 813, in square 458, subject to an encumbrance at this time of \$26,500.00; also lot 56 in square 2243, subject to an encumbrance of \$5700.00, all located in the District of Columbia. Said real estate is assessed for the purposes of taxation as of the value of \$81,489.00, and is subject to encumbrances aggregating \$50,200.00.

12. The business assets of the said company consist, so far as this plaintiff can now state, of the following:

Merchandise, approximately	\$40,000.00
Installment and conditional sales notes, approximately	50,000.00
Open accounts receivable, approximately	40,000.00
Total	<u>\$130,000.00</u>

Liabilities:

For merchandise, approximately	\$ 19,500.00
Borrowed money, approximately	13,000.00
Fire and other insurance	1,500.00
Total	\$ 34,000.00

13. In the month of March, 1941, the said defendant company sold and conveyed parts of lots 13, 14, 15, 16, 18 and 19, in square 700, for the sum of \$34,447.50, the net amount realized from such sale being \$28,519.40, after deduction of encumbrances, taxes and expenses of sale. Such amount, however, payable and belonging to the defendant corporation, was not paid to the account of the company, but the individual defendants insisted
 9 that said sum should be deposited in a special account to the credit of the said defendants and this plaintiff, subject only to be withdrawn on checks signed by all three, which this plaintiff was compelled to acquiesce in because of the immediate necessity for additional funds for the purposes of the defendant company. The said sum was deposited in the National Bank of Washington the 25th day of March, 1941, and from said fund, only on the condition that the company should receive the sum of \$5,000.00 therefrom for its immediate wants, this plaintiff was compelled to agree that the defendants, Hymen Stern and Celia Stern, could withdraw the sum of \$5,000.00 therefrom as a loan for ninety days. Subsequently, because of the threat of the holder of encumbrances upon the hereinbefore mentioned real estate to foreclose the same because of default of the company in the payment of the District of Columbia taxes upon the said real estate for the year ending June 30, 1941, the said individual defendants agreed that the sum of \$2,000.00 should be withdrawn therefrom and applied to that purpose, on condition, however, that the said company should deposit in the said bank, accounts and notes

receivable amounting to \$4,212.50, belonging to the company, which are now so held by the said bank.

14. The balance to the credit of the aforesaid deposit in the said National Bank of Washington is at the present time the sum of \$12,041.21, to which the said company is entitled.

10 15. Because of the character of the business conducted by the defendant company and hereinbefore averred, it has for some years been and is now financially strained and has been and is unable to pay the taxes due the District of Columbia assessed against the said several parcels of real estate for the year ending June 30, 1942, as a consequence of which the said company has been notified by District of Columbia officials that the said real estate will be advertised for sale in December, 1942, and in January, 1943, and will be sold if any part of such taxes remain unpaid at that time. Lots 15, 16, 17 and 813 in square 458 are now being advertised to be sold the 27th day of August, 1942, at four o'clock P. M., under the deed of trust securing the said indebtedness of \$26,500.00, because of the default of the company in the payment of the semi-annual interest due July 3, 1942 in the sum of \$596.25, a curtailment due upon the said encumbrance in the sum of \$500.00, interest at 4½% on such curtail in the sum of \$1.50, and the taxes thereon for the year ending June 30, 1942, in the sum of \$996.55, plus interest and penalties, aggregating the principal sum of \$2,094.30. The amount of taxes in default is the principal sum of \$1307.33, plus penalties and costs. A copy of the advertisement of sale is herewith filed marked "Exhibit A.S. No. 1".

11 16. Plaintiff further avers that he made repeated demands on the individual defendants herein that there be permitted the withdrawal from the said fund deposited in the National Bank of Washington, of sufficient funds to pay such taxes and various sums

for interest and amortization in default as aforesaid, but without avail, such request being finally made by registered letter bearing date August 8, 1942, to which this plaintiff has received no reply. A copy of said letter of August 8, 1942, is hereto annexed and marked "Exhibit A.S. No. 2".

17. Plaintiff further avers and says that the premises in Square 458 last referred to are the premises in which the business of the said company has for many years and is now being conducted.

18. For a long period continued dissension and hostility has existed between the said Hymen Stern and Celia Stern against the plaintiff, which has since the death of their mother, the said Helene Stern, been aggravated and increased without any justification whatsoever, and although the plaintiff has used every means through friends, attorneys and others, to ameliorate such condition and conciliate the said defendants, the said two defendants having heretofore frequently threatened to put plaintiff out of the said establishment, this before the employees thereof, seriously affecting the morale of such employees, several of whom have been induced by the defendants, Hymen and Celia Stern, to leave the employment of the said establishment and enter into employment in the said defendants' Norfolk store.

The utter indifference of the said individual defendants to the financial condition of the concern and its future, their continued interference and bickerings with the plaintiff, their remarks to the clerks thereof to the effect that plaintiff will in a short time be out of the said establishment, their action in tying up the funds of the corporation, refusing to allow the same to be used for payment of taxes, interest and amortization upon the mortgage on its real estate, so that the same has been advertised for foreclosure as hereinbefore set forth, their withdrawal of the company funds when such funds were

needed for the payment of the company's maturing liabilities, and refusal to repay the same, all resulting in this plaintiff's finding it necessary to continue to borrow funds from relatives and friends to meet bills for merchandise required to continue the concern's business, with the consequent loss of its credit with manufacturers, wholesale dealers and its bank, has resulted in making continued operation of the business no longer possible.

19. Plaintiff further avers that the defendant corporation is indebted to him in a sum of no less than \$3,340.00, salary for services rendered by him in the operation and conduct of its business.

WHEREFORE, the plaintiff prays:

1. That defendants be required to answer the premises and that for that purpose process issue herein
13 directed to them requiring them to appear and answer this complaint by a day therein fixed.

2. That a receiver or receivers pendente lite be appointed for all the property and assets of the defendant, The Stern Company of Washington, D. C., with authority to take charge of, conduct and operate the business of the said defendant company under the directions of this court.

3. That a receiver or receivers be appointed for all the property and assets of the defendant, The Stern Company of Washington, D. C., within the jurisdiction of this court, with authority to take charge of, conduct and operate the business of the said defendant company under the directions of this Court, and that all agents, servants and officers of the said defendant company, as well as any and all other persons, be required to deliver up to such receiver or receivers, all the property, assets, moneys, books and papers of every nature and kind, belonging to the said Stern Company.

4. That the sum of \$12,041.21 on deposit in the National Bank of Washington in this complaint referred to in the name and to the credit of this plaintiff and the said individual defendants, be declared to be the property and assets of and belonging to the defendant, The Stern Company of Washington, D. C.; that the same be transferred and delivered into the possession and custody of the receivers herein appointed, and that the defendants, Hymen Stern and Celia Stern, be directed and required to join with this plaintiff in making such transfer.

5. That the property and assets of the defendant, The Stern Company of Washington, D. C., within the jurisdiction of this Court, be administered and disposed of under the direction of this Court.

6. That for the purposes aforesaid all necessary orders and references be made.

7. That the plaintiff may have such other and further relief as to the court may seem meet and proper.

/s/ Abram E. Stern
Abram E. Stern

TOBRINER, GRAHAM, BREZ & TOBRINER

by /s/ Illegible signature
Attorneys for Plaintiff
Suite 932, Southern Building
Washington, D. C.

District of Columbia, to wit:

15 I, ABRAM E. STERN, being first duly sworn, on my oath do depose and say that I have read the foregoing Bill by me subscribed and know the contents thereof: that the matters and things therein stated

upon my personal knowledge are true, and those stated upon information and belief, I believe to be true.

/s/ Abram E. Stern
Abram E. Stern

Subscribed and sworn to before me this 18th day of August, A. D. 1942.

/s/ Illegible signature
Notary Public in and for the
District of Columbia.

16 Filed Aug 19 1942 Charles K. Stewart, Clerk

"Exhibit A. S. No. 1"

ADAM A. WESCHLER & SON, INC.,
Auctioneers.
915 E St. N.W.

TRUSTEES' SALE OF VALUABLE BUSINESS PROPERTIES CONSISTING OF ONE-STORY BRICK BUILDING KNOWN AS 634 D STREET N.W.; FOUR-STORY AND BASEMENT BRICK BUILDING KNOWN AS 636 D STREET N.W.; AND THREE-STORY AND BASEMENT BRICK BUILDING KNOWN AS 629-31 INDIANA AVENUE N.W.

By virtue of a certain deed of trust, dated January 3, 1941, being instrument No. 576, recorded January 7, 1941, among the land records of the District of Columbia, and at the request of the party secured thereby, the undersigned trustees will sell at public auction, in front of the premises, on THURSDAY, THE TWENTY-SEVENTH DAY OF AUGUST, A. D. 1942, AT FOUR O'CLOCK P.M., the following-described land and premises, situate in the City of Washington, District of Columbia, and designated as and being part of original lot numbered four (4) in square numbered four hundred and

fifty-eight (458), described as follows: Beginning at the northwest corner of said lot, and running thence south 72 feet; thence easterly 23 feet 10 $\frac{3}{4}$ inches along line of land conveyed to Varnum by Beck by deed recorded in Liber R. M. H. 19 at folio 332 among the land records of the District of Columbia to intersect a line drawn south from a point on "D" street 22 feet 6 inches east of the beginning; thence north 64 feet 5 inches to "D" street; thence west 22 feet 6 inches to the beginning. Also part of original lot numbered four (4) in square numbered four hundred and fifty-eight (458), beginning on "D" street 22 feet 6 inches east of the northwest corner of said lot numbered four (4), thence east on said street 21 feet; thence south 64 feet 9 inches; thence southeasterly, and at right angles to Louisiana avenue 64 feet 9 $\frac{9}{10}$ inches to a point on said avenue, 16 feet 6 inches southwesterly from the southeast corner of said lot; thence southwesterly along said avenue 23 feet 3 inches; thence northwesterly at right angles to said avenue 69 feet 10 inches; thence northeasterly 2 feet 6 inches to a point 67 feet 10 inches due south of the beginning; thence north 67 feet 10 inches to the beginning, being identical with lots 15 and 17 in Joseph B. Varnum and others' subdivision of lots in square numbered four hundred and fifty-eight (458), as per plat recorded in the office of the surveyor for the District of Columbia in Liber C. H. B. at folio 371. Also lot numbered sixteen (16) in Joseph B. Varnum and others' subdivision of lots in square numbered four hundred and fifty-eight (458), as per plat recorded in the office of the surveyor for the District of Columbia in Liber C. H. B. at folio 371.

Terms of sale: One-third of the purchase money to be paid in cash, balance in two equal installments, payable in one and two years, with interest at 5 per centum per annum, payable semi-annually, from day of sale, secured by deed of trust upon the property sold, or all

cash, at the option of the purchaser. A deposit of \$1,000.00 will be required at time of sale. All conveying, recording, etc., at cost of purchaser. Terms of sale to be complied with within 30 days from day of sale, otherwise the trustees reserve the right to resell the property at the risk and cost of defaulting purchaser, after five days' advertisement of such resale in some newspaper published in Washington, D. C.

HARRY L. RYAN, Jr.,
ROGER J. WHITEFORD,

au17,19,21,24,26

Trustees.

"Exhibit A.S. No. 2"

17

Filed Aug 10 1942
Charles E. Stewart, Clerk

COPY

THE STERN COMPANY OF WASHINGTON, INC.
625-31 Indiana Avenue, N. W.
Washington, D. C.

August 8, 1942

Mr. Hyman Stern,
500 Market Street
Norfolk, Va.

Miss Celia Stern,
1411 Hamilton Street N. W.
Washington, D. C.

The Stern Company of Washington, D. C. has received notice from Shannon and Luchs Company, Inc. that because default has occurred in the payment of real estate taxes, first trust interest and curtail due July 3rd, 1942, that they have been instructed to institute foreclosure proceedings under the terms of the deed of trust.

As of July 27th, 1942 there was due the following

\$ 596.25 semi-annul interest
 \$ 500.00 curtail
 \$ 1.50 interest on curtail due July 3, 1942
 \$ 996.55 1942 taxes plus penalties.

\$2094.30 total due

I am advising you of this fact so that you can make available the funds that we have on deposit in the National Bank of Washington to pay the above and thereby save this property which has a valuable equity. We do not have available sufficient funds in the Corporation.

Please give this your attention and advise me at once whether you are willing to use the funds on deposit in the National Bank of Washington to pay the above amount of \$2094.30.

Yours very truly,

THE STERN COMPANY OF WASHINGTON,

by

* * * *

18

Filed Sep 14 1942
 Charles E. Stewart, Clerk

*Joint and Several Answer and Counter-Claim and Cross-
 Claim of Defendants Hymen Stern and Celia Stern
 to the Plaintiff's Original Complaint*

(14 Exhibits)

The joint and several answer and counter-claim and cross-claim of the defendants Hymen Stern and Celia Stern to the original Complaint of the plaintiff, Abram E. Stern, respectfully states:

1. The allegation of Paragraph 1 thereof is admitted.

2. Answering Paragraph 2, these defendants admit that the plaintiff is a resident of the District of Columbia, and that he brings this suit in his own right as the owner of record of $23\frac{1}{2}$ shares of the capital stock of the defendant, The Stern Company of Washington, D. C., which Company these defendants say is a corporation created and organized under the laws of the State of Delaware. The plaintiff is the Vice-President and one of the Directors of the said corporation, and he has been since the incorporation and organization of said company in 1925. The plaintiff is also the owner of nine (9) shares in addition to the aforesaid $23\frac{1}{2}$ shares of the capital stock of said company, which said nine (9) shares were bequeathed to him under the last will and testament of Helene Stern, who departed this life on November 24, 1940, and who was the mother of the plaintiff and the defendants Hymen Stern and Celia Stern, of which said will the plaintiff and his brother, the defendant Hymen Stern, are the duly qualified Executors, as is hereinafter more fully set forth. The defendant, Celia Stern, was bequeathed, under the will of her mother, Helene Stern, now deceased, thirty-three (33) 19 shares of the capital stock of the said defendant corporation, all of which is more particularly hereinafter set forth.

These defendants admit that the defendant Hymen Stern is a resident of Norfolk, Virginia, and that the defendant, Celia Stern, is a resident of the District of Columbia, as alleged, and they say that each of them is an adult citizen of the United States, which the Complaint omits to set forth. The plaintiff is also an adult citizen of the United States, which the Complaint likewise omits to allege.

These defendants admit that the defendant The Stern Company of Washington, D. C., was created and organized under the laws of the State of Delaware, which occurred in 1925, as hereinafter more particularly set forth.

These defendants deny the conclusion of law alleged in the last sentence of Paragraph 2 of the Complaint that the defendant, The Stern Company of Washington, D. C. "is a pro forma corporation." The facts with reference to the creation and the organization of the defendant The Stern Company of Washington, D. C., as a corporation are hereinafter set forth.

3. Answering Paragraph 3 of the Complaint, these defendants say that on, to wit: September 20, 1916, and for several years immediately prior thereto, Max E. Stern, now deceased, who was a son of Helene Stern, now deceased, and a brother of the plaintiff, Abram E. Stern, and a brother of the defendants, Hymen Stern and Celia Stern, operated and managed the business referred to in the Complaint, in store-rooms Nos. 629-631 Indiana Avenue, N. W., this city.

On or about May 22, 1916, whilst said Max E. Stern, was operating said business, he became by purchase the owner in fee simple of one of the said store-rooms, to wit: 631 Indiana Avenue, N. W., (being lot 16 in square 458, one of the parcels of real estate mentioned in the Complaint) having bought the same by deed in fee from H. Sidney King to said Max E. Stern, dated May 22, 1916, which was recorded May 24, 1916, in Liber 3878, folio 396, one of the land records of this District; and thereupon, said Max E. Stern, unmarried, executed and delivered two several deeds of trust upon said lot 16, in Square 458, one to John D. Coughlan et al. trustee, which was recorded May 24, 1916, in Liber 3878, folio 397, and the other deed of trust to Gardiner and Dent, trustees, recorded May 24, 1916, in Liber 3878, folio 400, of 20 said Land Records, to secure monies borrowed by said Max E. Stern to consummate the purchase of the said real estate.

These defendants say that although the said business was being then conducted by the said Max E. Stern, as aforesaid, his mother, Helene Stern and his two brothers, Abram E. Stern, plaintiff herein, and the defendant, Hymen Stern, claimed that a partnership of the said business existed by and among the said four persons, which the said Max E. Stern disputed. Thereupon, on or about September 16, 1916, agreeably to all of said four parties, and after a full discussion by and among the mother, and her said three sons, in reference to the dispute relating to the ownership of the said business, Helene Stern, the mother, purchased from her said son, Max E. Stern, the entire said business, together with all of the merchandise, stock in trade and the assets of every description in connection with said business, subject to the then existing liabilities of the said business, and she also purchased from the said Max E. Stern the aforesaid real estate, namely, Lot 16, in square 458, (being premises 631 Indiana Avenue, N. W.) subject to then existing encumbrances of record, at and for the sum of approximately Nine thousand dollars (\$9,000.00), all of which purchase money was paid by the mother, Helene Stern, to her said son, Max E. Stern, was provided by her entirely out of her estate. Neither Abram E. Stern, the plaintiff herein, nor the defendant, Hymen Stern, furnished any part of the said purchase money. Accordingly, in consummation of the aforesaid purchase, Max E. Stern, unmarried, executed and delivered his deed, dated September 20, 1916, conveyed said lot 16, in square 458, to his mother, Helene Stern, in fee simple, subject to existing encumbrances of record, which deed was recorded September 21, 1916, in Liber 3902, folio 399, of the land records of this District, and he, said Max E. Stern, unmarried, also executed and delivered a bill of sale to his mother, Helene Stern, conveying to her, absolutely, all of the merchandise, assets, and all personal property in con-

nection with said business. Said Bill of Sale, dated September 20, 1916, was recorded September 21, 1916, in Liber 3902, folio 344, of the land records of this District.

Thereupon, said Max E. Stern ceased to have any connection with the affairs of the said business.

21 Thereafter, the said business was carried on by the mother, Helene Stern, trading as The Washington Show Case Exchange and later as The Stern Company, until the creation and organization of the defendant, The Stern Company of Washington, D. C., as a corporation, in 1925, hereinafter more particularly referred to.

The said Helene Stern's two sons, Abram E. Stern, plaintiff herein, and Hymen Stern, one of the defendants herein, assisted in the actual conduct of the said business. The mother was consulted by her said two sons from time to time in the conduct of the said business, and particularly with reference to the financing thereof and the furnishing by her of money whenever ready cash was needed for the said business.

The various parcels of real estate mentioned in the Complaint were acquired by purchase by the mother, Helene Stern, between the years 1916 and 1925, and before the creation and organization in 1925 of the defendant, The Stern Company of Washington, D. C., as a corporation, by deed to her, in fee simple, which were recorded among the land records of the District of Columbia, all of which was well known to the plaintiff, Abram E. Stern, and his brother, the defendant Hymen Stern, before and at the time their mother became the owner in fee simple of each parcel of said real estate. These defendants also state the fact to be that the plaintiff, Abram E. Stern, and his brother, defendant Hymen Stern, attended to the details incident to the purchase by their mother of the said parcels of real estate.

The aforesaid parcels of real estate, situated in the District of Columbia, as well as other parcels of real estate, likewise situated in said District, subject to the then existing deeds of trusts of record, and also the aforesaid business and assets and personalty connected therewith, subject to existing liabilities of said business, were conveyed by Helene Stern to the defendant, The Stern Company of Washington, D. C., in fee simple, in 1925, upon the creation and organization of the said Company as a corporation, in consideration of the issuance to her, said Helene Stern, of all of the capital stock of said corporation, which consisted of One Hundred Shares (100), no par, all of which is hereinafter more particularly referred to.

22 4. Answering Paragraph 4 of the Complaint, these defendants admit there were controversies between the plaintiff, Abram E. Stern, and the defendant, Hymen Stern, which occurred on occasions between 1916 and on or about June, 1938, when both of them were managing the said business. During said period, the plaintiff had charge of the factory conducted in connection with said business, which was located at different times at 13th & Ohio Avenue, N. W., at 318 Maine Avenue, Southwest, and 128 Q Street, Northeast, and the defendant, Hymen Stern, had charge of the store and office located at 629-631 Indiana Avenue, N. W.

The defendant, Hymen Stern, says that the causes of the said controversies between him and the plaintiff were due to the facts that the plaintiff neglected his duties and he was careless in supervising the manufacture of equipment at the factory, which resulted in financial losses, and further, that the plaintiff assumed the attitude as though he was the sole and exclusive owner of the said business, an illustration of which is the following, namely: a customer, one Stravedes, who conducted a lunch room on D Street, between 9th and 10th Streets,

N. W., this city, purchased about the year 1936 from defendant corporation The Stern Company of Washington, D. C., of which the plaintiff was then and still is the Vice-president, on written conditional sales contract certain restaurant equipment for, approximately, \$6,500.00, the customer paying about \$500.00 as cash down payment, and agreeing to pay the balance in monthly installments of \$150.00 each: said customer deposited with the said The Stern Company a certain certificate, belonging to said customer, and in his name, evidencing a certain number of shares of the capital stock of a gold mining company, as collateral security for a part of the unpaid purchase price of the said equipment, the value of which collateral on the stock exchange at the time of the deposit thereof with The Stern Company was, approximately, \$2,300.00. About the year 1938, the defendant, Hymen Stern, being informed that the said customer, said Stravedes, had made sale of his said lunch room, including the said equipment theretofore purchased from The Stern Company on conditional sale contract, which had been duly recorded, said defendant, Hymen Stern, after investigation, ascertained that said information was true, and that the said equipment had been delivered by the said Stravedes to his said purchaser. Thereupon, the defendant, Hymen Stern, examined the books of The Stern Company and ascertained that there was no entry therein of the receipt by The Stern Company of money from the said Stravedes for the settlement of the balance of said equipment, and the bookkeeper of The Stern Company informed the defendant, Hymen Stern, that there was no entry in the books of said Company showing that the said Stravedes had paid to the company the balance of the purchase money for said equipment, and the said bookkeeper also informed defendant Hymen Stern that the aforesaid collateral which had been deposited by said Stravedes was missing from the safe of The Stern Company, where it had al-

ways been kept. In this connection, defendants hereby refer to the affidavit of Hazel M. White, being Defendants' Exhibit No. 13, hereto attached and hereby made part of this Answer.

Thereupon, defendant Hymen Stern requested said Stravedes to call at the office of The Stern Company, which he did, and in the presence and hearing of said Abram E. Stern (plaintiff herein), this defendant, Hymen Stern, and the attorney of said Stravedes, and said Stravedes, the latter made the statement that he, Stravedes, had theretofore paid to the said Abram E. Stern, plaintiff herein, for the said The Stern Company, \$1,600.00 in cash, for the aforesaid collateral, at which time said Abram E. Stern had delivered said collateral to him, said Stravedes, in full settlement of the balance of said Stravedes' indebtedness to The Stern Company. The defendant Hymen Stern avers and says that said Abram E. Stern did not deny the aforesaid statement of said Stravedes, made in his presence and hearing, but said Abram E. Stern remarked to defendant Hymen Stern, that the latter "was always looking for trouble", at the same time using vile language towards defendant Hymen Stern.

Another illustration of the manner in which the plaintiff, Abram E. Stern, has acted as a fiduciary officer of defendant corporation, relates to the liquidation of a certain mechanics' lien, in favor of The Stern Company,

24 defendant herein, filed at the instance and direction of the plaintiff as Vice-president of defendant corporation, for four thousand eight hundred and fifty-one dollars in the Mechanics Lien docket of the clerk's office of this court, on April 1, 1929, against certain lots in Square 72, in this District, improved by a large garage, built by one William E. Gore, of which The Semmes Motor Company was owner.

On information and belief, defendants say that one James B. Sparks was one of the principal subcontractors and also had a claim in a substantial amount against said property. The Stern Company, corporation, had supplied office partitions and quantities of wood work to said Sparks, sub-contractor of said garage, for which payment had not been made.

Upon information and belief, these defendants say that after the filing of the said mechanics lien of The Stern Company, as aforesaid, an arrangement was made with all of the parties concerned, including lien claimants, (Abram E. Stern agreeing for The Stern Company) whereby said Sparks purchased the property and made adjustment of claims, through his attorney, Louis Ottenberg, Esq., with the lien holders, including The Stern Company: that the lien of The Stern Company, corporation, was adjusted about January 31, 1930, by which The Stern Company, through Abram E. Stern, Vice-President thereof, was at that time paid \$526.00, in cash, and The Stern Company received notes, aggregating \$4325.00, executed and delivered by the said Sparks, which notes were secured by a second deed of trust upon the said real estate, consisting of the said land and the garage thereon; that on or about April, 1931, The Stern Company, by authority of Abram E. Stern, as Vice-President thereof, extended the time of the payment of the notes held by The Stern Company to April 7, 1932, and in April, 1932, \$312.82, representing the interest on the notes held by The Stern Company, was paid to said Abram E. Stern for The Stern Company, corporation.

Upon information and belief, these defendants say that thereafter the said property was sold, and as a part of the settlement of the outstanding second trust notes a compromise of the said second trust notes was made; that the notes which had been delivered to The Stern Company were wrongfully endorsed by The Stern Com-

pany, by Abram E. Stern, Vice-President, to himself, Abram E. Stern, personally, and he delivered the same to said Sparks, marked cancelled.

These defendants are informed and believe, and aver, that the said Abram E. Stern, on or about May 15, 1941, directed Louis Ottenberg, Esq., attorney, who disbursed the fund in payment of said second trust notes, to make the check in payment of the note or notes held and
 25 owned by The Stern Company in favor of Abram E. Stern, individually, for \$4325.00 in settlement and adjustment of the second trust notes held by The Stern Company of Washington, D. C., defendant herein, which was done, and the said Abram E. Stern, plaintiff herein, received a check in that form, dated May 15, 1941, on Liberty National Bank, and he endorsed the said check in his individual capacity and he, said Abram E. Stern, personally cashed said check. A photostat of said check and the endorsement of said Abram E. Stern is hereto annexed, marked Defendant's Exhibit No. 1, and is hereby prayed to be considered in connection with this Answer. These defendants call upon the plaintiff to explain why he transferred said notes to himself and why he directed the check in payment thereof to be made to his personal order, and why he did not turn the proceeds over to defendant corporation, The Stern Company, and cause an entry to be made in its books concerning said item. (Defendants hereby refer to affidavit of Hazel M. White, Defendants' Exhibit No. 13, who was the book-keeper of defendant corporation)

The plaintiff should be required to account for said money in this action. By reason of the mismanagement and the misconduct on the part of the said plaintiff, Abram E. Stern, in connection with the said business, the books and records concerning the financial affairs of The Stern Company became and were confused and remained incomplete and unbalanced. Reference is hereby

made to the affidavit of Virgil W. Chapin hereto annexed and made a part hereof.

After the discovery of the defendant, Hymen Stern, of the Stravedes-Abram E. Stern affair, a meeting was held at the home of the Stern family, at which were present the mother, Helene Stern, Abram E. Stern, Hymen Stern, Celia Stern and three business men, friends of the Stern family, to endeavor to get the plaintiff, Abram E. Stern, to co-operate in a proper manner with his brother, the defendant, Hymen Stern, in the furtherance of the best interests of the business. When the meeting opened, the defendant, Hymen Stern, began to recite the facts with reference to the collection by the plaintiff of the aforesaid \$1600.00 in cash from the aforesaid Stravedes and retaining the said money for his own use, instead of accounting for the same, but one of the friends of the family, present at said meeting, informed the defendant,

26 Hymen Stern, that he did not desire to pass upon the facts relating to said transaction, and the others present, excepting the defendant, Hymen Stern, agreed that it was best not to bring that matter up. The defendant, Hymen Stern, thereupon stated that inasmuch as the item of \$1600.00 was, in his opinion, a substantial one, and was important, the failure of Abram E. Stern to account for the same to The Stern Company was a vital subject matter for consideration and action.

The defendant, Hymen Stern, stated, as the main object of the meeting, in his opinion, had failed, it seemed to him that it was unnecessary to continue discussion of the affairs of The Stern Company. The meeting then adjourned. Thereupon, which was about June, 1938, the defendant, Hymen Stern, ceased to be active in the conduct of the said business, on account of the repeated acts by Abram E. Stern, plaintiff herein, of mismanagement of the business affairs of defendant, The Stern Company, the careless and wrongful ways in which the plaintiff

handled transactions in which the said company was financially interested, resulting in financial losses, and the assumed attitude by said Abram E. Stern as if he was the exclusive owner of the said business, and also by reason of the extreme dictatorial and arbitrary manner of the said Abram E. Stern, especially in affairs concerning the said company. In this connection reference is hereby made to the affidavit of Virgil W. Chapin, hereto attached, marked Defendant's Exhibit No. 2, and hereby prayed as part hereof, in which it set forth, among other things, that said Abram E. Stern requested said Chapin not to disclose any information concerning the business of the Stern Company to either his brother, Hymen Stern, or his sister, Miss Celia Stern.

The defendant, Hymen Stern, avers and says that after numerous unsuccessful attempts by the defendant, Hymen Stern, to persuade the said Abram E. Stern to change his attitude and conduct, the defendant, Hymen Stern, decided to cease active service in behalf of the company, as it was impossible to get the plaintiff to change his said attitude, or to co-operate with said defendant in a friendly way.

Again, the defendant, Hymen Stern, avers and says that it seemed impossible for him to prevent the
27 plaintiff, Abram E. Stern, from diverting monies belonging to the corporation, The Stern Company, to his, Abram E. Stern's personal use, without authority of the said defendant corporation, or to get him to account to the company respecting the same, unless a suit was filed against the said Abram E. Stern. The defendant, Hymen Stern, decided to defer the filing of an action against the said Abram E. Stern, the plaintiff herein, on account of the then extreme age of the mother of these defendants and the plaintiff. If an action had been filed by defendant, Hymen Stern, the mother of these defendants and the plaintiff would have been a party thereto.

The facts in reference to the incorporation and organization of the business of the defendant, The Stern Company of Washington, D. C., mentioned in Paragraph 4 of the Complaint are set forth in Paragraph 5 of this Answer.

5. Answering paragraph 5 of the Complaint, these defendants admit that a Certificate of Incorporation for the defendant, The Stern Company, of Washington, D. C., signed and verified by Helene Stern, Abram E. Stern, plaintiff herein, and Hymen Stern, one of the defendants herein, dated February 23, 1925, was filed with the Secretary of State of Delaware on April 17, 1925, setting forth a total authorized capital of one hundred shares of common stock, without nominal or par value, and with perpetual existence.

A certified copy of said Certificate is hereto attached, marked Defendant's Exhibit No. 3, and prayed to be considered part hereof.

These defendants say that on to wit, November 18, 1925, the incorporators, of whom the plaintiff, Abram E. Stern, was one, and the subscribers to the capital stock, of whom the plaintiff was one, held their first meeting in Washington, D. C., of which all the incorporators of and the subscribers to the capital stock of the corporation had due notice, and at which meeting all of them were present, excepting the defendant, Hymen Stern; that said meeting recognized the Certificate of Incorporation of The Stern Company of Washington, D. C., theretofore filed with the Secretary of State of Delaware, enacted

By-Laws for the government of said corporation, 28 elected by ballot the following officers: Helene Stern, President and Director, Abram E. Stern (the plaintiff herein), Vice President, Director and Treasurer, Nathan Cayton, Secretary and Director, and Milton B. Thomas, Director, each to hold office as such officer

until the next annual meeting of the stockholders in 1926, and until their successors shall be chosen and qualify; that the plaintiff, Abram E. Stern, being personally present at said meeting, accepted the offices to which he was elected. Said Abram E. Stern, the plaintiff herein, was the Inspector of Election at said organization meeting.

A copy of the minutes of said organization meeting, and a copy of the By-Laws of said corporation, are hereto annexed, marked Defendants' Exhibits Nos. 4 & 5, and hereby prayed to be considered parts hereof.

By reference to the minutes of said organization meeting held November 18, 1925, it will be seen that Helene Stern offered to sell, transfer and convey to said corporation, The Stern Company of Washington, D. C., the business theretofore conducted by her under the name of "The Stern Company" and "The Washington Show Case Exchange", including all of the assets contained in the factory on Maine Avenue, subject to all debts incurred in the management and conduct of said business, and also offered to convey to said corporation the following parcels of real estate, subject to all encumbrances of record, to wit: Lots fifteen (15), sixteen (16) and seventeen (17) in Joseph B. Varnum's Subdivision of part of square Four hundred Fifty-eight (458) as per plat recorded in Liber C.H.B. folio Three Hundred seventy-one (371) in the records of the office of the Surveyor of the District of Columbia; and

Also Lots Six (6) and Seven (7), and Lots Eight hundred and three (803) to Eight Hundred and Twenty-one (821), both inclusive, in Square Seven Hundred (700) in the District of Columbia, subject to existing encumbrances of record, upon the terms that in consideration of the conveyance by said Helene Stern of the business and real estate aforesaid, the corporation shall transfer and caused to be issued to her One hundred (100) shares of the

capital stock of no par of said corporation, and that the
said corporation shall likewise execute and deliver
29 to her its promissory note for \$10,000.00, payable
to the order of Celia Stern (daughter of Helene
Stern) in equal installments of Two Thousand Dollars
(\$2,000.00) per year after date, for all of the capital
stock of said defendant corporation.

The minutes also set forth the said offer was carefully
considered, and the stockholders were of the opinion that
the assets and property aforesaid, subject to the debts
and encumbrances aforesaid, are of the value of One
Hundred shares of the capital stock of the said corpora-
tion, of no par value; it was thereupon unanimously re-
solved as follows:

"Resolved, that the contract as offered by Mrs. Helene
Stern be accepted, and that the corporation shall issue to
her in exchange for her executed deed to the property
named, the shares of stock of this company, in accordance
with her direction."

These defendants say that Abram E. Stern, the plain-
tiff, was present at said meeting and voted in favor of
the aforesaid resolution.

Thereupon, to consummate the aforesaid contract, said
Helene Stern, as grantor, executed and delivered her deed
to The Stern Company, of Washington, D. C., a corpora-
tion organized under the laws of the State of Delaware,
as grantee, in fee simple, all of the pieces and parcels
of real estate, aforesaid described, and which are particu-
larly described in her deed, said deed in fee reciting that
said lands thereby conveyed to said corporation were
subject to the existing encumbrances of record. Said
deed bears date November 18, 1925, and was duly re-
corded as Instrument No. 56, on November 25, 1925,
among the land records of the District of Columbia; and
on to wit: November 18, 1925, said Helene Stern, as

grantee, executed and delivered her Bill of Sale to The Stern Company of Washington, D. C., a corporation organized under the laws of Delaware, its successors and assigns, all the goods, chattels and personal property therein described, namely, the show case and equipment business then conducted by the grantor, Helene Stern, at Nos. 629, 631 and 633 Louisiana Avenue (which was the name of the street then, and afterwards changed to Indiana Avenue) N. W., Washington, D. C., together with all the stock in trade contained in said premises, all book accounts and promissory notes connected with said business and all machinery, merchandise and equipment contained in the factory on Maine Avenue, between
 30 Four and one-half ($4\frac{1}{2}$) and Sixth Street, S. W., Washington, D. C., subject to all debts "owing by me" [Helene Stern] "at this time arising out of the conduct of said business", which debts the corporation thereby assumed and agreed to pay.

Said bill of sale, dated November 18, 1925, was duly recorded November 25, 1925, as Instrument No. 64, among the land records of the District of Columbia.

These defendants are informed and believe, and aver, that thereupon, the said Helene Stern, being the owner of the one hundred (100) shares of the capital stock of said corporation, The Stern Company of Washington, D. C., directed said corporation, by its officers, to allot said shares, and issue certificates of stock, as follows:

To herself	51	shares
To Abram E. Stern (her son) plaintiff herein	23 $\frac{1}{2}$	"
To Hymen Stern (her son) one of defendants herein	23 $\frac{1}{2}$	"
To Nathan Cayton	1	"
To Milton B. Thomas	1	"
Total	100	shares

which direction was complied with, and said certificates of stock were duly delivered to said stockholders, which adjusted and settled the previous respective partnership interests of the mother and her two sons, Abram E. Stern and Hymen Stern, in said business.

That following the meeting of the aforesaid organization meeting, the Board of said corporation held a meeting on November 18, 1925, at which were present all of the Directors, namely, Helene Stern, Abram E. Stern, Nathan Cayton and Milton B. Thomas, at which, among other business transacted, the minutes of the first meeting of the stockholders were read and approved, the Treasurer (Abram E. Stern) was authorized to open a bank account in behalf of the company with the National Bank of Washington, withdrawals of funds of the company on deposit with it to be upon and according to the check of the company signed by its Treasurer, and By-Laws of the company were read, article by article, and unanimously adopted, and the Directors ratified the action of the stockholders in accepting the offer of

31 Helene Stern to sell and transfer her business and certain real estate, as set forth in the minutes of the stockholders' meeting, all of which will more fully appear by reference to said meeting of said Board of Directors, copy of which, marked Defendants' Exhibit No. 6, is hereby annexed and made part of this Answer.

A copy of the minutes of the meeting of the stockholders of the defendant corporation, The Stern Company of Washington, D. C., held May 27, 1927, is hereto annexed, marked Defendants' Exhibit No. 7, and is hereby made a part of this Answer. At said meeting, and by reference thereto, it appears that all of the stockholders, including Abram E. Stern (the plaintiff herein) were present in person and that Messrs. Milton Strasburger and Alexander Wolf were also present; that the resignations of Messrs. Nathan Cayton and Milton B. Thomas

were presented and accepted; that the one share of stock held by each of them was surrendered, and there was issued to Milton Strasburger, Esq., one share of stock and to Alexander Wolf, now deceased, one share of stock, said shares to be transferred to them to be held nominally by them for the purpose of serving as members of the Board of Directors: that the condition of the affairs of the company was discussed and the differences existing straightened out and the resignation of Abram E. Stern, as Treasurer, was accepted, and also the resignation of Nathan Cayton as Secretary was accepted; that Hymen Stern (defendant herein) was elected Treasurer and Secretary of the company and that Messrs. Milton Strasburger and Alexander Wolf were elected Directors, and that the Board and officers of the company thereupon consisted of the following: Helene Stern, President; Abram E. Stern (plaintiff herein), Vice President; Hymen Stern, Secretary and Treasurer; Milton Strasburger and Alexander Wolf, members of the Board. That the President signed the various stock certificates presented for her signature and that the stock of the company outstanding is as follows:

Helene Stern	51	shares
Abram E. Stern	23½	"
Hymen Stern	23½	"
Milton Strasburger	1	"
Alexander Wolf	1	" ;

32 That it was agreed that the profits of the company to be declared as dividends from time to time should be declared on the basis of one-third to each of the three first named stockholders, and that the two remaining stockholders, Milton Strasburger and Alexander Wolf, each simply hold one qualifying share; a resolution was passed declaring that the National Bank of Washington be the depository of the company; that the money and securities be deposited in the said bank to

the credit of the company and not to be withdrawn therefrom except on the checks in the name of the company, signed by the Treasurer and countersigned by the Vice President: that all the present accounts belonging to the company, whether in the name of The Stern Company of Washington, D. C., in the name of the Washington Show Case Exchange, or in any other name whatsoever, should all be closed by the withdrawal of the money on deposit, such checks to be signed by the Treasurer and countersigned by the Vice President, and the proceeds of all such accounts should be deposited in the corporation account, under the name of The Stern Company of Washington, D. C., to be withdrawn only as hereinbefore set forth, that is to say, in the name of The Stern Company of Washington, D. C., by checks signed by the Treasurer and countersigned by the Vice President: it was further resolved: that no notes, acceptances or evidence of indebtedness be made except in the name of the company, signed by the Treasurer and countersigned by the Vice President: and the said stockholders fixed the salaries at said meeting as follows:

Helene Stern, President	\$125.00 per week
Abram E. Stern, Vice President	125.00 " "
Hymen Stern, Secretary-Treasurer	125.00 " ";

that at said meeting Helene Stern called attention to the agreement entered into between herself and her two sons for the incorporation of the company and the conveyance by her of the real estate to the corporation and the payment to Celia Stern of the sum of \$10,000.00, whereupon it was unanimously agreed that no note was to be given as evidence of this indebtedness, and the same was not to be put in the form of an obligation of the company, excepting in the event of the marriage of the said Celia Stern, at which time, and from and after the date of

the said marriage, there should be paid to her Two
33 Thousand Dollars (\$2,000.00) per year for a period
of five years, total Ten Thousand Dollars (\$10,-
000.00); that interest on said obligation should only run
from the date of her marriage; that proper acknowledg-
ment should be executed in the name of the company,
signed by the President, Vice President and Secretary-
Treasurer, in their official capacities and under the seal
of the said corporation.

That since May 27, 1927, the plaintiff, Abram E. Stern,
has been Vice President and member of the Board of
Directors of said corporation, and held himself out as
such.

That from the date of the incorporation and organiza-
tion of said company, to on or about June, 1938, the
plaintiff, Abram E. Stern, and his brother, Hymen Stern,
one of the defendants herein, actively managed the busi-
ness affairs of the said corporation, and since to wit:
June, 1938, to the date hereof the plaintiff, as Vice Presi-
dent of said corporation, has managed said business and
has been in exclusive charge thereof; that the defendant,
Celia Stern, assisted in the conduct of said business from
the organization of said company until on or about 1939.
That the said Abram E. Stern, by his dictatorial and
arbitrary manner exhibited toward his brother, Hymen
Stern, and his sister, Celia Stern, in the conduct of said
business, made it practically impossible for his said
brother, Hymen Stern, and his sister, Celia Stern, to
remain as employees or associates of the said plaintiff
in carrying on the said business.

6. Answering paragraph 6 of the Complaint, these
defendants admit that since the incorporation and organi-
zation of the defendant corporation, The Stern Company
of Washington, D. C., whenever it became necessary for
said corporation to execute and deliver deeds in fee simple

of different parcels of real estate, situated in the District of Columbia and owned by said corporation, and the said corporation to execute and deliver deeds of trust upon its real estate, situated in said District, or leases upon real estate located in said District, and owned by said corporation, the plaintiff, Abram E. Stern, as the Vice President, and the defendant, Hymen Stern, as the Secretary thereof, duly executed and delivered such instruments, for and in behalf of said corporation, the seal of said corporation being attached to each of said instruments, which said instruments recited the fact that the same were executed pursuant to resolutions of the Board of Directors of said corporation, certified copies of such resolutions being annexed to said instruments, which said instruments were duly recorded among the land records of the District of Columbia.

Amongst others, the following instruments were executed and delivered by said corporation, by Abram E. Stern, as Vice President, attested by Hymen Stern, as Secretary thereof, with the corporate seal of said corporation annexed thereto:

(a) Deed of trust dated June 1, 1928, by and between The Stern Company of Washington, D. C., a body corporate, duly incorporated under the laws of the State of Delaware, acting therein pursuant to a resolution of its Board of Directors (a duly certified copy of which resolution was annexed thereto), as party of the first part, and the American Security and Trust Company, a corporation, as party of the second part, securing \$50,000.00 for money borrowed by said corporation pursuant to the above mentioned resolution and securing eighteen (18) promissory notes of said corporation, signed with its corporate name by its Vice President Abram E. Stern, attested by its Secretary, upon certain pieces and parcels of real estate of said corporation, described in said deed

of trust, and which deed of trust was duly acknowledged before a Notary Public of this District by the said Abram E. Stern. Said deed of trust was recorded June 5, 1928, in liber 6163, folio 49, et seq., one of the land records of the District of Columbia.

(b) Deed of trust, dated July 31, 1940, by and between The Stern Company of Washington, D. C., a body corporate, duly incorporated under the laws of the State of Delaware, acting therein pursuant to a resolution of its Board of Directors (a duly certified copy of which resolution was thereto annexed), party of the first part, and the American Security and Trust Company, Trustee, as party of the second part, which said instrument conveyed to the party of the second part certain parcels of real estate, situated in the District of Columbia and described therein, and said instrument was signed by The Stern

Company of Washington, D. C. with its corporate
 35 seal, by its Vice Pres. Abram E. Stern, and by its Secretary, Hymen Stern, and acknowledged by Abram E. Stern as Vice President, to which said instrument was attached a copy of the resolution of said corporation authorizing the execution of said instrument by the signature of Abram E. Stern as Vice President and Hymen Stern as Secretary. Said instrument was recorded October 15, 1940, as instrument No. 33,161, in liber 7532, folio 395, et seq., of the land records of this District.

(c) Deed of trust dated January 3, 1941, by and between The Stern Company of Washington, D. C., a corporation organized and existing under the laws of the State of Delaware, acting by authority of a resolution of its Board of Directors and stockholders, party of the first part, and Harry L. Ryan, Jr. and Roger H. Whiteford, Trustees, parties of the second part, securing \$27,500.00 for money loaned to the said The Stern Company of Washington, D. C., as securing its one certain promis-

sory note for said sum, payable three years after date, with interest until paid at the rate of $4\frac{1}{2}\%$ per annum, said deed of trust being upon certain real estate, situate in the District of Columbia and owned by said The Stern Company of Washington, D. C., a corporation, and fully described in said deed of trust, which said deed of trust was executed by said corporation. The Stern Company of Washington, D. C., by Abram E. Stern, Vice President, attested by Hymen Stern, Secretary thereof, with corporate seal of said company attached, and the said Abram E. Stern duly acknowledged said instrument on behalf of the said The Stern Company of Washington, D. C., on January 3, 1941, certificate of the Secretary certifying that the aforesaid deed of trust was executed in accordance with and by authority of a resolution of the Board of Directors and stockholders of The Stern Company of Washington, D. C. Said deed of trust was recorded January 7, 1941, in liber 7565, folio 391, et seq., of the land records of this District.

(d) Instrument dated November 16, 1940, executed by The Stern Company of Washington, D. C., by Abram E. Stern, Vice President, attested by Hymen Stern, Secretary of The Stern Company of Washington, D. C., a corporation, with its corporate seal attached, being duly acknowledged by Abram E. Stern as attorney in fact and
 36 by virtue of the power and authority vested in him
 by The Stern Company of Washington, D. C., which
 instrument cancelled a previous lease dated June 19, 1940, from said corporation. The Stern Company of Washington, D. C., to the Gulf Oil Corporation, to certain premises owned by The Stern Company of Washington, D. C., which was recorded in Book No. 7502, page 397 of the land records of said District, said instrument being signed by The Stern Company of Washington, D. C., by Abram E. Stern, Vice President, attested by Hymen Stern, Secretary, with corporate seal of said corporation

annexed, and also signed by the Gulf Corporation by W. V. Hartman, Vice President, and attested by O. G. Cramer, Assistant Secretary, with corporate seal annexed, and which said instrument was duly acknowledged by Abram E. Stern in behalf of said corporation, The Stern Company of Washington, D. C. Said cancellation of lease was recorded as Instrument No. 577, January 7, 1941, in liber 7565, folio 395, et seq., one of the land records of this District.

These defendants are legally advised and believe, and therefore aver, that the plaintiff, Abram E. Stern, is estopped from asserting or claiming that The Stern Company of Washington, D. C. is not a corporation, and these defendants are further legally advised and believe, and therefore aver, that the plaintiff, Abram E. Stern, is estopped from claiming or asserting that the assets and properties of the defendant corporation, as between the plaintiff and defendant, Hymen Stern, have reverted to them as a partnership, as alleged. These defendants therefore deny the legal conclusion alleged at the end of paragraph 6 of the Complaint that the assets and properties, real and personal, of the corporation, The Stern Company of Washington, D. C., as between the plaintiff and defendant, Hymen Stern, have reverted to them practically as a partnership.

These defendants allege the facts to be that the plaintiff is a minority stockholder of said corporation, owning 32½ shares thereof, the defendant, Hymen Stern, is a minority stockholder thereof, owning 32½ shares and the defendant, Celia Stern, is a minority stockholder thereof, owning 33 shares thereof, total 98 shares, and the remaining two shares are owned, one by Milton Strasburger, Esq., and the other by the estate of the late Alexander Wolf, their two shares having been issued to them to qualify them as members of the Board of Directors.

7. Answering paragraph 7 of the Complaint, these defendants hereby refer to paragraph 5 of this Answer, which sets forth the facts respecting the sale and conveyances by the late Helene Stern, by her deed in fee simple, and her bill of sale, of the parcels of real estate and assets of the said business, to the defendant corporation.

8. Answering Paragraph 8 of the Complaint, these defendants admit that their mother, Helene Stern, departed this life on November 23, 1940, leaving a last will and testament, which is dated December 2, 1932, in which the testatrix appointed the plaintiff, Abram E. Stern, and the defendant, Hymen Stern, Executors thereof. The said will was admitted to probate and record by the Probate Branch of this Honorable Court, by order dated January 22, 1941, in administration cause No. 57,884, which order appointed plaintiff Abram E. Stern, and defendant, Hymen Stern, Executors thereof, and letters testamentary were issued to them on January 23, 1941, upon their filing a special undertaking of Five Thousand Dollars (\$5,000.00), which was approved by the court.

A certified copy of said will is hereto annexed, marked Defendants' Exhibit No. 8, and is hereby made a part hereof, and will be hereinafter more particularly referred to.

The present balance in bank to the credit of the Executors is \$4,131.93.

Further answering Paragraph 8, these defendants say, to the best of their knowledge and belief that, exclusive of Federal and District of Columbia Estate taxes, and Executors' commissions, the debts of the said Estate have been paid. The plaintiff and defendants being fully acquainted with the financial affairs of their mother, the plaintiff agreed with the defendants that if defendants would consent to a special bond or undertaking by the Executors, the plaintiff would co-operate actively, with-

out delay, with his co-executor, Hymen Stern, and close the said Estate within ninety (90) days from the date of their qualification as Executors; that relying upon such agreement, these defendants consented that such
38 special bond or undertaking be given, but the plaintiff breached the said agreement, although the defendant, Hymen Stern, made many trips from Norfolk, Virginia, to this City, since the Executors qualified on January 23, 1941, and on each occasion said defendant urged the plaintiff to co-operate with him, Hymen Stern, to close the estate, but said Abram E. Stern always rendered flimsy excuses for not doing so.

The defendant, Hymen Stern, says that being advised that it was necessary for the Executors to cause to be taken a physical inventory of the stock of merchandise and other personal property of the defendant corporation, as near as possible to November 23, 1940, the date of the death of the testatrix, in view of her ownership at the time of her death, of fifty-one (51) shares of the capital stock of the defendant corporation, the defendant, Hymen Stern, says that in February, 1941, and on many occasions thereafter, he urged the plaintiff to co-operate with him in the taking of such inventory, but defendant, Hymen Stern, was frequently informed by the plaintiff that he, the plaintiff, was too busy to do so. Finally, the plaintiff stated to the defendant, Hymen Stern, that he, the plaintiff, did not intend to take or cause to be taken a physical inventory and that he, the plaintiff, would give an estimated amount as of 1940 of the market value of the merchandise and personal property of the defendant corporation, as he, the plaintiff, had always done. The plaintiff having the exclusive possession of the business of defendant corporation, and the books and records connected therewith, furnished to the defendant, Hymen Stern, and to James C. Dulin, Jr., Esq., attorney for the Estate of Helene Stern, certain figures which he, the

plaintiff, stated to them represented the market value of the merchandise and personal property of the defendant corporation, which said attorney and defendant, Hymen Stern, relied upon. Said attorney prepared the Returns for Estate Taxes and the Executors filed the same on or about February 19, 1942: that said Returns set forth, among other things, that the market value of the afore-said fifty-one (51) shares of stock of the defendant corporation was \$37,060.28 as of November 23, 1940, being the figure the plaintiff represented as correct, to the attorney of said Estate and his co-executor, Hymen Stern, but the Estate and Inheritance Department of the District, after an examination of the books and records of the defendant corporation, increased the above stated figure to \$63,149.74.

39 Further answering Paragraph 8, these defendants say that the plaintiff has failed, neglected or refused to disclose to the local Estate and Inheritance Department of the District of Columbia an accurate account of the market value of merchandise the defendant corporation and/or the plaintiff repossessed from certain seventeen (17) vendees, whose notes were not paid to Helene Stern and which formed part of her residuary estate. That, on or about September 2, 1942, defendant Hymen Stern requested the plaintiff to furnish to him a correct written account of such market value of said last mentioned merchandise, and instead of doing so the plaintiff delivered to defendant Hymen Stern a haphazard account, written hurriedly by the plaintiff from his memory, purporting to cover the value of many articles of merchandise re-possessed by the plaintiff and/or the defendant corporation from fourteen (14) of the said vendees, over a period of three or four or more years immediately last past. The defendant, Hymen Stern, informed the plaintiff that such a statement or account could not be presented to the local Taxing authorities because it

was not accurate, and the plaintiff replied to said defendant, "I don't care how it is wanted, this is the way it is going to be given." (Reference is here made to affidavit of Victor H. Gottschalk, Jr., Defendants' Exhibit No. 14, hereto attached and hereby made part hereof)

9. Answering Paragraph 9, these defendants, on information and belief, say that since the filing of the Complaint, Milton Strasburger, Esq., who was the attorney for the late Helene Stern when defendant corporation was organized, delivered, temporarily, to the plaintiff's counsel his, said Milton Strasburger's certificate of one (1) share, and the certificate of said Helene Stern for fifty-one (51) shares of stock in defendant corporation, which is subject to the demand of the Executors of her Estate.

The other allegations of Paragraph 9 are admitted. The whereabouts of the certificate of one (1) share of the late Alexander Wolf are unknown to these defendants, who are informed and believed and aver that the Executors of his Estate do not claim to own the same.

10. Paragraph 10 is admitted, excepting that defendant corporation does business outside of the District of Columbia.

11. Answering Paragraph 11, these defendants say that the parcels of real estate therein set forth are owned by the defendant corporation in fee simple of record and the defendant corporation is in the possession of the same. Defendants further say that the existing balance of the encumbrance on certain of said real estate, lots 15, 16, 17 and 813, in square 458, is now \$26,000.00, and not \$26,500.00 as stated in said Paragraph 11.

Further answering Paragraph 11, these defendants say, on information and belief, that all of the aforesaid
40 pieces and parcels of real estate according to the 1942 Assessment Book, are assessed for the pur-

poses of taxation as of the value of \$77,617.00, and not \$81,489.00 as stated in Paragraph 11 of the Complaint.

12. Answering Paragraph 12 of the Complaint, these defendants admit that, as of June, 1942, the merchandise of the defendant corporation was of the value of approximately \$40,000.00 as set forth in said paragraph, but these defendants have no knowledge or information with reference to the other items of assets or the liabilities of the defendant corporation, excepting as alleged in said Paragraph 12, and they therefore cannot admit the correctness thereof, and these defendants demand strict proof thereof.

13. Answering Paragraph 13 of the Complaint, these defendants admit that in the month of March, 1941, the defendant corporation sold and conveyed parts of lots 13, 14, 15, 16, 18 and 19 in square 700, for \$34,447.50, and that the net amount realized from such sale was \$28,519.40, after deduction of encumbrances, taxes and expenses of sale, which said net amount was deposited in the National Bank of Washington on March 25, 1941, to the credit of the plaintiff, and these answering defendants, Hymen Stern and Celia Stern, being the owners of the capital stock of the defendant corporation (excepting the two outstanding shares in the names of Milton Strasburger, Esq. and the late Alexander Wolf, in whose names these two shares stood on the books of the corporation to qualify them as directors of the corporation, but neither of whom ever claimed to have any financial interest in said corporation), subject only to be withdrawn on checks signed by the plaintiff and these defendants.

These defendants admit that said net amount (\$28,519.40) belonged to the defendant corporation, as alleged, but, at the time of the receipt of said fund, March 25, 1941, and for some time prior thereto, the plaintiff was exclusively conducting and mismanaging the business of the defendant corporation, and had wrongfully excluded

these defendants from the said business, and by reason thereof, these defendants felt that, pending an accounting by the plaintiff, and an adjustment of the affairs of said defendant corporation, it was unsafe to turn over to the plaintiff, exclusively, said large sum of money, especially in view of the fact that the plaintiff had prior to March, 1941, neglected or failed or refused to render a proper accounting in respect to the financial affairs of the defendant corporation; and these defendants state that they desired to be acquainted with the facts in respect to the disbursement of said fund, from time to time, without being compelled to rely upon the unsubstantiated verbal statements that the plaintiff is accustomed to make in respect to the financial affairs of the defendant corporation.

Further answering Paragraph 13, these defendants say that, upon the urgent request of the plaintiff, these defendants reluctantly consented to and they did sign checks with the plaintiff against the said fund, payable to defendant corporation, and which were delivered to the plaintiff, as Vice President thereof, as follows: March 2, 1941, \$5,000.00; April 16, 1941, \$3,000.00; July 25, 1941, \$2,000.00; March 16, 1942, \$1610.00; March 20, 1942, \$32.10, a total of \$11,642.10, but plaintiff has never informed these defendants in what manner he disbursed the said mentioned total sum, excepting the proceeds of the check for \$2,000.00 turned over to the plaintiff July 25, 1941. The plaintiff has informed the defendant, Hymen Stern, that he utilized that amount for the year ending June 30, 1941, in the payment of interest and curtail on first deed of trust on certain real estate owned by the defendant corporation, and taxes thereon.

These defendants deny that the plaintiff was compelled to agree with the defendants Hymen Stern and Celia Stern to withdraw \$5,000.00 from said fund, "as a loan for ninety days" to these defendants, as alleged. These

defendants say that it was mutually agreed by and among the plaintiff and these defendants that a check should be drawn against said joint account to these defendants for said amount, as a credit on account of the indebtedness of the defendant corporation to these defendants. These defendants never agreed to repay said sum to the defendant corporation. The plaintiff has never requested them, or either of them, to repay said sum.

These defendants say that the defendant corporation is now indebted to these defendants on account of salaries and advances made by them to the defendant corporation.

42 Further answering Paragraph 13, these defendants say that as a part of the agreement and arrangement by and among the plaintiff and these defendants, the plaintiff, as Vice President of the defendant corporation, agreed to deposit with the National Bank of Washington notes receivable (under conditional sales contracts) belonging to the defendant corporation, aggregating \$4,212.50, and that collections to be received by said bank from said vendees to be credited to the said joint account of the plaintiff and these defendants; that between August 26, 1941, and August 25, 1942, both inclusive, the said Bank has received \$534.70 from some of the vendees or makers of said notes, but these defendants say that the plaintiff breached said agreement and understanding last aforesaid, in this: The plaintiff recently admitted to the defendant, Hymen Stern, that he, the plaintiff, had made collections from some of the makers (vendees) of the aforesaid notes and that he, the plaintiff, did not turn over the said collections to the National Bank of Washington to be placed to the credit of said joint account, but instead thereof, as these defendants believe and aver, the plaintiff has intermingled the said collections in such a way as necessitates an accounting by him in respect thereto.

Defendants further state, on information and belief, that on June 15, 1942, in a case entitled Burlington Hotel, plaintiff, vs. Abraham E. Stern, defendant, No. 406-636, in the Municipal Court of the District of Columbia, the plaintiff therein having obtained a judgment against Abram E. Stern, plaintiff in the instant action, issued a garnishment against the National Bank of Washington for \$353.71 (being the amount of the judgment and costs recovered against Abram E. Stern therein) against the said fund standing to the joint credit of Abram E. Stern, Hymen Stern and Celia Stern, in the said bank, and depleted said fund to the extent of said personal judgment against the said Abram E. Stern.

14. Answering Paragraph 14, these defendants say that the present balance to the joint credit of the plaintiff and defendants in the National Bank of Washington, referred to in said Paragraph, is \$9,879.40.

15. Answering Paragraph 15, these defendants say that on August 22, 1942, these defendants and the
43 plaintiff paid to Shannon & Luchs Company, as agent for the holder of the deed of trust notes, out of the reserve fund of the defendant corporation, \$2,188.89, and the foreclosure sale referred to in said Paragraph has been avoided.

These defendants say that the plaintiff has for some time last past been exclusively in the possession of said business and has handled all of the receipts therefrom, without informing these defendants, the majority stockholders of said company, in regard thereto, nor has he rendered any accounting to the company or to these defendants in respect to the affairs of said company. These defendants say that if the defendant company is now financially strained, as alleged, it is due to the mismanagement of the company's business by the plaintiff and his inefficiency and/or incompetency or neglect or failure

or refusal to keep proper books of account, and to the diversion of funds of the defendant corporation to the plaintiff's own use, without authority so to do.

These defendants say that the only time the plaintiff contacts these defendants is when the plaintiff informs them that ready cash is needed by him to carry on the business of the defendant company.

Further answering said Paragraph 15, these defendants say that the defendant corporation conducts its business in its own property (excepting 635 Indiana Avenue, N. W.). These defendants submit that in fairness the plaintiff should, at least, have caused to be paid, out of the receipts of said business, the taxes on the said real estate, and the interest and the curtail on the deed of trust on the four stories occupied by the defendant company wherein it conducts its business, which the plaintiff has failed to do.

16. Answering Paragraph 16 of the Complaint, these defendants hereby refer to their answer to Paragraph 15 hereof.

17. Paragraph 17 is admitted.

18. Answering Paragraph 18, these defendants say that the plaintiff has for some time last past assumed the attitude as if he were the exclusive owner of the business of the defendant corporation and instructed book-keepers and employees of the defendant corporation not to disclose any information in regard to the affairs of said company, to his mother, in her lifetime, or to
44 these defendants. In this connection, reference is hereby made to the affiants of Virgil W. Chapin and Albert Johnston Stephens (Defendants' Exhibits Nos. 2 and 9, respectively), hereto annexed and hereby made parts hereof.

These defendants deny that the differences which exist between the plaintiff and these defendants, characterized in said Paragraph 18 as "continud dissension and hostility" as "without any justification whatever". These defendants say that the plaintiff, a minority stockholder, wrongfully took exclusive charge of said business and has made no accounting, and continues to make no accounting either to the defendant corporation, or to these defendants, the majority stockholders thereof.

Reference is hereby made to the 4th Paragraph (pages 5-9) of this Answer, relative to the specific diversion by the plaintiff of funds belonging to the company.

These defendants deny that the plaintiff has endeavored to conciliate these defendants, as alleged, and they deny that these defendants, or either of them, have done anything which affected the morale of employees of the defendant corporation, as alleged.

These defendants deny that several employees of the company have been induced by them, or either of them, to leave the employment of the defendant company and enter into employment of the defendants' Norfolk store, as alleged. The untruthfulness of such allegation is shown by the affidavits of Jack Kahn and Sam Bender, hereto attached, the two former employees of the defendant corporation, unnamed in Paragraph 18 of the Complaint, marked Defendants' Exhibits Nos. 10 and 11, respectively, and hereby made parts hereof.

These defendants deny they, or either of them, are indifferent to the financial condition of the business of the defendant corporation, or that they or either of them, have interfered with the conduct of said business, as alleged. Since the death of her mother, defendant Celia Stern says that she has on several occasions loaned large sums to the defendant corporation, turning over same to

the plaintiff, at his request, but some of the advances have not been returned to her.

The defendant Hymen Stern, has, since the death
 45 of thier mother, repeatedly requested the plaintiff
 to co-operate with defendant Hymen Stern, as
 Executors of their mother's Estate, in the final settle-
 ment of her Estate, and carry out the terms and provi-
 sions of her will, so that the rights and interests of the
 devisees and legatees thereunder might be properly en-
 tered on the books of the defendant company, but the
 plaintiff has pursued dilatory tactics, rendering flimsy
 excuses for his failure to do so. The plaintiff has re-
 peatedly informed defendant Hymen Stern that he, the
 plaintiff, was too busy to attend to such matters and he
 has put defendant Hymen Stern off from time to time.

These defendants have no knowledge or information of
 the borrowing of money by plaintiff from relatives and
 friends to conduct said business, except as alleged, and
 defendants cannot admit such allegation, but these de-
 fendants are informed and believe and aver that the
 plaintiff indulges in the practice of "check-kiting" due to
 his inefficiency and incompetency and his methods of con-
 ducting a business of the size and importance of the
 defendant company. (Defendant hereby refer to affidavit
 of Victor H. Gottschalk, Jr., hereto attached, marked De-
 fendants' Exhibit No. 14, and hereby made part hereof)

19. Answering Paragraph 19, these defendants deny
 that the defendant corporation is indebted to the plaintiff
 "in a sum no less than \$3,340.00" for salary, as alleged.
 On the contrary, these defendants say that upon an ac-
 counting by the plaintiff, under the direction of this Hon-
 orable Court, it will be disclosed that the plaintiff is per-
 sonally indebted to defendant company in a large sum of
 money, and that said defendant corporation and/or the
 plaintiff, individually, or as Executor of the Estate of
 Helene Stern, is indebted to said Estate and/or defendant

Celia Stern, as the residuary legatee under her mother's will, by reason of the intermeddling by the plaintiff, or by defendant corporation and/or the plaintiff personally with the said trust estate, and the intermixture by the plaintiff of the residuary estate of Helene Stern, with monies of the defendant corporation.

Further answering said Complaint, these defendants say that they forwarded by registered mail, postage prepaid, on August 26, 1942, to the plaintiff Abram E. Stern, as Vice President of the defendant corporation and as co-executor under the will of his mother, a letter
46 bearing said date, requesting said Abram E. Stern to co-operate with defendant Hymen Stern, as co-executor and as Secretary and Treasurer of the defendant corporation, in the surrender of the 51 shares of capital stock of the defendant corporation, and cause to be issued in lieu thereof new certificates, one for nine (9) shares to Abram E. Stern, one for nine (9) shares to defendant Hymen Stern, and one for thirty-three (33) shares to defendant Celia Stern. A duplicate copy of said letter is hereto annexed, marked Defendants' Exhibit No. 12 and is hereby made a part hereof.

Defendants say that they received a letter in reply, dated September 3, 1942, from counsel of the plaintiff, declining to do so in view of the fact that the Estate and inheritance taxes against the estate of Helene Stern had not been finally adjusted.

These defendants say that the Executors have paid \$1064.51 to the Federal Government which accompanied their Return, and defendant Hymen Stern as co-executor has received no additional bill, if any is to be rendered.

These defendants say that the Estate and Inheritance Department of the District of Columbia informed the defendant Hymen Stern that, after an examination of the books of the defendant corporation the Department desires

the payment of the following Estate and Inheritance taxes by the Executors:

For Celia Stern, devisee	\$1301.13
For Abram E. Stern, devisee	61.75
For Hymen Stern, devisee	61.75
Total	\$1324.63

And the officials of the District of Columbia department advised defendant Hymen Stern that if a satisfactory showing were made respecting the amounts received by the defendant corporation and/or Abram E. Stern from merchandise repossessed from the aforesaid seventeen (17) vendees (makers of notes), the aforesaid taxes might be reduced. The plaintiff has, or should have, the necessary data, but the defendant Hymen Stern has been unable to get a satisfactory account respecting the amounts from the plaintiff. In reference thereto defendants hereby refer to Paragraph 8, page 22 of this Answer.

The Executors have \$4131.93 to their credit in bank.

47 These defendants submit that, in view of the long delay that is likely to occur if the plaintiff continues to neglect or refuse or fail to co-operate with his co-executor, Hymen Stern, in the adjustment of the said taxes, the transfer of the said 51 shares of the capital stock of the defendant corporation can be made at this time according to the terms and provisions of the last will and testament of said Helene Stern, deceased. These defendants are willing to endorse new certificates to them, in blank, if the plaintiff will endorse his new certificate, in blank, and thereupon the three of them can deposit the same into the custody of the Executors of said Estate, to be held as collateral security, pending co-operation upon the part of the plaintiff, Abram E. Stern, as co-Executor of said Estate, to the end that the final administration or closing of said Estate may not be "tied

up" indefinitely which has resulted from the procrastination, indifference and dilatory tactics of the plaintiff heretofore indulged in and now being indulged in by the plaintiff as one of the Executors of said Estate.

Further answering the Complaint, these defendants say that, as majority stockholders of the defendant corporation, and pursuant to sub-paragraph (f) of Section 3 of the By-Laws of defendant corporation, these defendants did sign a written request, dated September 11, 1942, requesting a special meeting of the stockholders of defendant corporation, to be held at the office of the corporation, 629-631 Indiana Avenue, N. W., this city, on September 23, 1942, at the hour of 4 o'clock, p.m., for the following objects, which are set forth in said written call, namely:

(1) to employ counsel to oppose the appointment of a Receiver or Receivers of the defendant corporation in a suit filed August 19, 1942, by Abram E. Stern, as plaintiff, against The Stern Company of Washington, D. C., Hymen Stern and Celia Stern, being Civil Action No. 16,833, District Court of the United States for the District of Columbia, in which the plaintiff prays for the appointment of a Receiver or Receivers, pending said suit, to take custody of all of the assets of said defendant corporation, and also praying that said Receiver or Receivers be authorized and directed to operate the business of said corporation, and also to dispose of the assets of said corporation (being the instant action); and

(2) to fix a date for the holding of the annual meeting of the stockholders of The Stern Company of Washington, D. C., corporation, for the purpose, among
48 other business to be transacted, to elect officers and directors of The Stern Company of Washington, D. C., corporation, and to carry on the internal affairs of said corporation.

The defendant Hymen Stern avers and says that said written call was delivered to him, as the Secretary of said corporation, on said 11th day of September, 1942, and pursuant thereto he, Hymen Stern, as such Secretary, did on said 11th day of September, 1942, mailed a written notice, dated September 11, 1942, signed by him as such Secretary and sealed in an envelope, postage prepaid, to each and all of the stockholders of the defendant corporation, notifying them, and each of them, of the aforesaid special meeting and requesting them and each of them to attend the same at the time and place aforesaid, namely, September 23, 1942, at the office of The Stern Company, corporation, 629-631 Indiana Avenue, N.W., Washington, D. C., at the hour of 4 o'clock, p.m., said written notice being addressed to each of said stockholders at the correct address of each of them in this city.

Further answering the Complaint, defendant Hymen Stern says that in June, 1942, a conference was held by and among the plaintiff, Abram E. Stern, the defendant, Hymen Stern, and James C. Dulin, Jr., Esq., the attorney for the Executors of the late Helene Stern, with the officials of the Estate and Inheritance Department of the District of Columbia, with reference to the Return of the Executors of her Estate theretofore filed with said Department, when it was decided that a certified Public Account be employed by the said Executors to have made, without unnecessary delay, an audit as of 1940 of the books of The Stern Company, corporation, defendant herein, for the purpose of ascertaining the market value of the 51 shares of the capital stock of said company, owned by the late Helene Stern, as of the date of her death, November 23, 1940. Defendant Hymen Stern says that about two weeks later, in June, 1942, the plaintiff informed him that he, the plaintiff, had secured the services of a local Certified Public Accountant

to make said audit at a cost of \$500.00. Defendant Hymen Stern says that in July, 1942, he contacted the plaintiff, with reference to said audit, and the plaintiff told him that the books were being audited for 1940 and that the work would be completed in the near future.

Not being satisfied with such promise, defendant
49 Hymen Stern interviewed said Certified Public

Accountant employed by said Abram E. Stern to perform said service, and said Accountant informed defendant Hymen Stern that he had not been employed to audit the books of The Stern Company of Washington, D. C. for 1940, but that he was employed to audit the books of that company for 1941 and 1942, but that his assistants were on vacation, and besides his office was busily engaged in the preparation of returns for his clients in certain tax matters, and that he would have to contact the said Abram E. Stern because, he, said Accountant, did not understand that he was employed to make an audit of the books of The Stern Company of Washington, D. C. for 1940. Thereupon, defendant Hymen Stern contacted said Abram E. Stern about the proposed audit for 1940, informing him what said Accountant told defendant Hymen Stern, and said Abram E. Stern replied to defendant Hymen Stern that he, Abram E. Stern, intended to get in touch with said Accountant.

That up to the date hereof, no audit of the books of said defendant company for 1940 has been made, to the best knowledge, information and belief of these answering defendants, and each of them.

These defendants aver and say that they and each of them are well acquainted with the nature and character of the business of the defendant corporation and are capable of conducting and managing said business, and as these defendants are the majority stockholders of the defendant corporation they should be permitted to operate, control and manage the internal affairs of said

company, which they stand ready and willing and are anxious to do, certainly in preference to a Receiver or Receivers. And these defendants respectfully ask the Court to defer action upon the prayer of the plaintiff for a Receiver or Receivers pendente lite, and to afford these defendants an opportunity to hold the aforesaid stockholders' meeting called for September 23, 1942, as aforesaid, and therefore permit the majority stockholders to control the internal affairs of the defendant corporation instead of appointing a Receiver or Receivers.

These defendants say that it would be extremely difficult and most expensive for said business to be conducted under a Receivership, and furthermore a receivership is unnecessary, and the same would be unjust and inequitable to the rights and interests of these defendants as such majority stock holders of the defendant corporation. The plaintiff having exclusively mismanaged said business since 1938, and is now mismanaging the same, defendants submit the plaintiff is in no position to seek a receivership.

50 *Defendants' Paragraph 20, Defendants' Cross
Claim and Counter Claim*

(a) Further answering the Complaint, and for counter-claim and cross claim against the plaintiff, Abram E. Stern, individually and as Executor under the last will and testament of Helene Stern, and the defendant corporation, and each of them, these defendants say that after several specific bequests of diamonds and jewelry, and two bequests of \$25.00 each, Helene Stern, testatrix, by Item VI of her last will and testament (certified copy of which is hereto attached and made part hereof, Defendants' Exhibit No. 8) bequeathed the 51 shares of the capital stock of the defendant corporation, owned by her at the time of her death, as follows: nine (9) shares to the plaintiff, Abram E. Stern, nine (9) shares to de-

fendant, Hymen Stern, and thirty-three (33) shares to defendant, Celia Stern.

(b) By Item VII of said will, testatrix devised to her daughter, defendant Celia Stern, in fee simple, premises No. 1411 Hamilton Street, N.W., this city, in which testatrix resided, subject to existing encumbrance thereon, which these defendants say was \$3,000.00, and testatrix also bequeathed to her said daughter the entire contents of said house. The fair market value of said real estate is Ten thousand dollars (10,000.00) and the household effects \$200.00.

(c) That by Item VIII of said will, testatrix
51 devised to her said daughter Celia Stern, in fee simple, (defendant herein) all of the rest, residue and remainder of her estate, of which the testatrix died seized or possessed, which these defendants say consisted of the following: cash in bank to the credit of the testatrix, \$4,953.58, owned by her, and certain notes (owned by testatrix at the date of her death) which had been executed and delivered by fifty (50) conditional vendees under fifty (50) conditional sales written contracts with defendant corporation (which had been duly recorded among the land records of this District, all of which said notes had been purchased by the said Helene Stern from the defendant corporation, at different times in her lifetime, for a sum of money equal to the face amount of each and every note (of said fifty (50) conditional vendees) above referred to, and upon each and every occasion when said Helene Stern purchased a note, or notes, as aforesaid, and paid the consideration therefor (that is a sum of money equal to the face amount of each note as aforesaid) to the defendant corporation, the defendant corporation endorsed the said note or notes and delivered the same to the said Helene Stern, and these defendants state the fact to be that the agreement by and between the said Helene Stern and said defendant cor-

poration, by Abram E. Stern, as the vice-president thereof, was that if after his mother purchased a note or notes or such conditional vendees, and the said note was not paid by the vendee (maker thereof) and such note or notes turned out to be unsatisfactory to her, the defendant corporation would deliver to said Helene Stern a good and satisfactory note or notes of conditional vendees of defendant corporation so that said Helene Stern would sustain no pecuniary loss, inasmuch as she paid the defendant corporation the full face amount of such note or notes so purchased by her from the defendant corporation. These defendants state the fact to be that the defendant corporation and/or Abram E. Stern, vice-president thereof, had the same agreement and understanding with defendant Celia with reference to notes belonging to defendant corporation which said corporation sold to her, each of which was by said corporation endorsed before delivery thereof to defendant Celia Stern.

1 The aforesaid notes of said fifty (50) conditional
52 vendees were deposited by said Helene Stern, in
her life-time, in The American Security & Trust
Company, 7th & E Streets, s.w. branch, for collection,
and from time to time the payments which were made on
said notes by the vendees, that is, the makers thereof,
to the said Bank, were credited to the personal bank
account of said Helene Stern which she carried in said
Bank. At the date of her death (November 23, 1940),
certain notes (of the aforesaid fifty (50) vendees) of
which thirty-three (33) conditional vendees were and are
the makers, were in the said Bank for collection, as afore-
said, for credit to account of Helene Stern, and the
same were left there by the Executors of Estate of
Helene Stern for collection by Abram E. Stern and de-
fendant Hymen Stern, as such Executors. At the date
of the death of Helene Stern, the total amount remain-
ing unpaid on the notes of the said thirty-three (33)

vendees, including interest to November 23, 1940, was the sum of \$30,157.91. All of the collections received by said Bank since the death of Helene Stern have been credited by said Bank to the credit of said Executors, but, on information and belief, these defendants aver and say that the plaintiff, Abram E. Stern, individually, and/or the defendant corporation, by said Abram E. Stern, have improperly received payments from some of the vendees (makers of said notes), which notes are at said Bank for collection for the Executors and belong to said Estate, same forming part of the residuary Estate of Helene Stern, and these defendants say that said Abram E. Stern and/or defendant corporation have made no accounting whatever for such collections to the Executors of the said Estate, nor have Abram E. Stern and/or defendant corporation delivered such collections to said Bank, or rendered any statement in respect thereto or any accounting therefor either to his co-executor, Hymen Stern, or to defendant, Celia Stern, residuary legatee under her mother's will.

(d) These defendants say that in addition to the aforesaid notes of said thirty-three (33) vendees, the late Helene Stern owned, at the date of her death certain notes of seventeen (17) conditional vendees (the remaining notes of the aforesaid 50 conditional vendees, mentioned in sub-paragraph (c) hereof, under conditional sales written contracts with defendant corporation, which testatrix, in her life-time, purchased from defendant corporation, paying therefor a sum of money equal to the face amount of each note, and endorsed by defendant

53 corporation (with the same agreement and understanding with respect to replacing (with Helene Stern) a satisfactory and good conditional vendee note if a vendee failed to pay his note, as hereinbefore set forth, in order that the mother of said Abram E. Stern would sustain no pecuniary loss in buying a note

for the face amount thereof: that said last mentioned notes of said seventeen (17) conditional vendees (or makers), not including interest, aggregated \$21,008.03 (at the date of the death of Helene Stern), and which said notes had not been paid to her by the makers or to said Bank for her, but which notes said Bank had returned to said Helene Stern approximately five (5) months prior to her death. On information and belief, these defendants aver and say that the plaintiff, Abram E. Stern and/or the defendant corporation, by said Abram E. Stern, as vice-president thereof, caused to be made repossessions from said seventeen (17) conditional vendees of the merchandise embraced within the conditional sales written recorded contracts for which said notes were given, and said Abram E. Stern, individually, and/or defendant corporation, by said Abram E. Stern, as vice-president thereof, retained or sold the said merchandise so recaptured or re-possessioned, or the said Abram E. Stern, individually or as vice-president of defendant corporation, made compromise settlements with said seventeen (17) conditional vendees, or some of them, but the plaintiff and/or defendant corporation have never made any accounting in respect to such transaction, or the intermeddling or intermixture of said trust estate with funds of defendant corporation, either to the Estate of Helene Stern, or to his co-executor, Hymen Stern, defendant herein, or to defendant Celia Stern, defendant herein, who is the residuary legatee under her mother's will.

(e) The defendant, Celia Stern, avers and says that as the residuary legatee under her mother's will, she is the owner of all of the notes of the aforesaid fifty (50) vendees, and she is entitled to all of the rights under said conditional contracts (which secure said notes). The defendant corporation and/or plaintiff, Abram E. Stern, individually, or as Executor of said Estate, or as vice-president of defendant corporation, should be required

to account herein to the Estate of Helene Stern, deceased, and/or to Celia Stern, defendant herein, in respect to the intermeddling with said trust estate by the plaintiff and/or defendant corporation regarding all of the said notes which form part of the residuary estate of the testatrix.

54 (f) These defendants demand a full and complete discovery and/or accounting from the plaintiff, individually, or as co-executor of the Estate of Helene Stern, and/or as vice-president of the defendant corporation and/or the defendant corporation in respect to any and all collections received by them, or any of them, from the vendees under the aforesaid fifty (50) conditional sales contracts, whose notes belong to the Estate of said Helene Stern, and/or respecting all repossessions of merchandise under the said fifty (50) conditional sales contracts, or under any of said contracts, and/or the value of the merchandise, re-possessed by the defendant corporation and/or the plaintiff as co-executor of said Estate, or otherwise, which said merchandise is described in said conditional sales contracts, and/or the proceeds derived from the sale or re-sale by defendant and/or plaintiff of said merchandise embraced in said contracts, all of which belongs to the Estate of the late Helene Stern.

(g) The defendant Hymen Stern says that the plaintiff and/or defendant corporation have never rendered any accounting or statement to defendant, plaintiff's co-executor, or to the defendant, Celia Stern, as residuary legatee under her mother's will, respecting the collection by the plaintiff and/or defendant corporation on any of said notes (which the bank did not receive at its banking house) which were received by the plaintiff and/or defendant corporation from any of said fifty (50) conditional vendees, nor has the plaintiff and/or defendant corporation rendered any accounting whatever to his co-

executor or to defendant Celia Stern concerning the merchandise repossessed by the plaintiff and/or defendant corporation from any of the aforesaid 50 conditional vendees.

(h) These defendants say that the defendant corporation and/or the plaintiff in any capacity whatever never delivered to the testatrix in her life-time, or to her Executors any good or satisfactory note to re-place any-one of the notes of the aforesaid fifty (50) conditional vendees which was not paid to the said Bank or to the Executors of the Estate of said Helene Stern.

55 WHEREFORE, the premises considered, these defendants pray:

1. That each prayer prayed for in the Complaint be denied.

2. That no Receiver or Receivers of defendant corporation be appointed.

3. That the Complaint be dismissed with costs against the plaintiff.

4. That the plaintiff, Abram E. Stern, individually, and as Executor of the Estate of Helene Stern, deceased, be deemed and considered as party hereto, or as cross-defendant.

5. That defendant, Hymen Stern, as co-executor under said will of Helene Stern, be made party hereto in that capacity.

6. That the plaintiff, Abram E. Stern, individually, and as Executor as aforesaid, and the defendant corporation, each of them, render an accounting herein to his co-executor, Hymen Stern, and to defendant Celia Stern, as legatee and devisee under the will of Helene Stern, deceased, with respect to all monies, notes, merchandise and all assets of every kind belonging to the Estate of

Helene Stern, deceased, and that the plaintiff in any capacity whatsoever and defendant corporation, and each of them, fully discover with reference to the assets of said Estate, and to that end this cause be referred to the Auditor of this Honorable Court.

7. That a final decree be entered herein against the plaintiff, individually, and/or as the Executor of the Estate of Helene Stern, and/or against defendant corporation, The Stern Company of Washington, D. C., after an accounting herein by them and each of them, for all monies that shall be found to be due by them, and each of them, either to the Estate of Helene Stern, deceased, and/or to defendant Celia Stern, as residuary legatee and devisee under the said will of Helene Stern, deceased, or to Hymen Stern as Executor under said will.

8. That the plaintiff, Abram E. Stern, be removed as Executor under the will of Helene Stern, deceased, and that he be denied all commissions as one of the Executors of the Estate of Helene Stern, deceased.

9. That the plaintiff and/or defendant corporation be required to deliver to defendant Hymen Stern, as successor Executor under the will of said Helene Stern, deceased, all personal property, assets and monies belonging to said Estate.

56 And for such other and further relief as the nature of the case may require and to the Court shall seem proper and necessary in the premises.

/s/ Hymen Stern

Hymen Stern

/s/ Celia Stern

Celia Stern

Defendants and Cross-
plaintiffs.

/s/ Levi H. David
 Levi H. David
 Bond Building
 Washington, D. C.
 Attorney for Hymen Stern
 and Celia Stern, Defendants
 and Cross-Plaintiffs.

DISTRICT OF COLUMBIA, to wit:

We, Hymen Stern and Celia Stern, being severally duly sworn, on oath do severally depose and say that we and each of us have read the foregoing and annexed Answer and Counter-claim and Cross-claim, by each of us subscribed, and we and each of us know the contents thereof: that the matters and things therein stated upon our personal knowledge, and the personal knowledge of each of us are true, and those therein stated upon information and belief, we and each of us believe to be true.

/s/ Hymen Stern
 Hymen Stern

/s/ Celia Stern
 Celia Stern

Subscribed and sworn to before me this 14th day of September, 1942.

/s/ Mary C. Perry
 Notary Public in and for
 the District of Columbia.

My commission expires Mar 1, 1944

100 Filed Oct 15 1942 Charles E. Stewart, Clerk

*Answer of Abram E. Stern to the Cross-Claim
and Counter-Claim of the Defendants,
Hymen Stern and Celia Stern*

Abram E. Stern, herein referring to himself as respondent, for answer to the cross-claim and counter-claim of the defendants, Hymen Stern and Celia Stern, filed herein with their answer to the plaintiff's complaint, says:

For answer to the various subparagraphs of what is marked paragraph 20 in the said answer of the defendants, he says:

(a) Answering subparagraph (a), respondent admits that the said Helene Stern in and by her will bequeathed fifty-one shares of the capital stock of The Stern Company, as set forth in the said subparagraph. This respondent, with Hymen Stern, his co-executor named in the probated will of the said Helene Stern, has executed a special undertaking in the penalty of
101 \$5,000.00, to pay all debts and claims against the decedent and the estate of the said Helene Stern, and having knowledge of the fact that the said Helene Stern for many years prior to her death failed to make returns to the Federal Government of income received by her, and anticipating claims to be made by the Internal Revenue Department of the Government of the United States for default or failure to make such income tax returns, and the consequent demands upon the executors of the said estate for payment thereof, he is holding the said fifty-one shares, together with other assets belonging to the said estate so far as his rights to do so, until an adjustment or release of such claims is made, and the estate is in condition for a final distribution among those legally entitled thereto under the will of the said deceased and said executors are free from any liability because thereof.

(b) This respondent admits the averments of subparagraph (b), insofar as it avers the bequest of premises 1411 Hamilton Street, N. W., to the said Celia Stern. He avers on information and belief that the encumbrance upon the said real estate is in the sum of approximately \$3,000.00. He admits the bequest to the said Celia Stern of the entire contents of the said house.

In this connection this respondent says that upon the death of his mother, the said Helene Stern, the said defendants, Hymen Stern and Celia Stern, with the
 102 knowledge that he was named as one of the co-executors of decedent's will, without his knowledge or consent opened the safe in the said home, and removed all the contents thereof, never acquainting this respondent therewith, nor has this respondent ever been permitted as the co-executor of the said estate, to take an inventory of the contents of the said home, and he is consequently unable to state the value thereof. The said Celia Stern has taken possession of said contents and is occupying the said home.

(c) Answering subparagraph (c), this respondent admits that under the will of the said Helene Stern, Celia Stern is the residuary legatee. He avers that by the petition of this respondent, and the said Hymen Stern, made with the approval of the said Celia Stern, for the probate of the will of said Helene Stern, filed in the Probate Branch of this Honorable Court, it is alleged that deceased was possessed of promissory notes of the value of \$15,000.00. He has no knowledge or information of how many conditional sales notes referred to in said paragraph, came into the possession of the said Helene Stern. The number of conditional vendees or fifty conditional sales is immaterial, but he denies, as hereinafter set forth, that the said Helene Stern purchased said notes from the said Stern Company for a sum of money equal to the face amount of each and

every note of said fifty conditional vendees, or that she ever paid a sum of money equal to the face amount of such notes as it is claimed she purchased.

103 The endorsement by the corporation upon the said notes is admitted. He denies that there was any agreement by and between the said Helene Stern and the said Stern Company, made by him as the Vice-President thereof or otherwise, that if after his mother became possessed of a note or notes of such conditional vendees, and the said note was not paid by the maker thereof, and such note or notes turned out to be unsatisfactory to her, that The Stern Company would deliver to her a good and satisfactory note or notes of conditional vendees, so that the said Helene Stern would not suffer any pecuniary loss. And this denial applies to all allegations in said counter or cross-claim in relation to the substitution of notes, and he again denies that the said Helene Stern paid The Stern Company the full face amount of each note or notes so taken over by her from it.

Further answering, this defendant denies that any such similar arrangement was had with the said Celia Stern. He admits on information and belief that the notes in the said paragraph referred to were deposited by the said Helene Stern in the American Security and Trust Company, 7th and E Streets, S. W., for collection.

He admits that at the date of death of the said Helene Stern, some of these notes were in the said bank for collection for her account, and that the same were left there for collection by the said Hymen Stern and this respondent as executors of the estate of the said Helene Stern. This respondent does not know
104 the total amount remaining unpaid on the said notes to be \$30,157.91, as alleged in the said subparagraph. He avers as hereinbefore stated, that the petition for the probate of the will of the said Helene

Stern stated the promissory notes to be of the value of \$15,000.00. This defendant denies that he or The Stern Company through him have improperly received payments from some of the makers of said notes which are at the said bank for collection for account of the said executors, but he avers that if any collection for and on account of the said notes was received by him or the said corporation, the same has been duly delivered to the said bank. He admits that he has never made any accounting for any collections received by him to the executors of the estate, but he avers that the same were delivered to the said bank, and he says that he has never been requested by her co-executor, Hymen Stern, or the said Celia Stern, to make any report to them; that the said Hymen Stern could obtain all necessary information from the bank.

(d) Answering subparagraph (d), this defendant says that he has no knowledge that the said Helene Stern in addition to the notes mentioned in subparagraph (c), at the date of her death owned notes executed by seventeen vendees, for which it is averred she paid a sum of money equal to the face amount of each note, but if she took over such notes from the corporation, he denies
105 that it was for a sum of money equal to the face amount of each note. He has no knowledge or information that the said notes aggregated on their face \$21,800.05, at the date of the death of the said Helene Stern.

Further answering subparagraph (d), this respondent says that in the course of the business of the said defendant corporation it became necessary on many occasions, because of the default of purchasers on conditional sales in the payment of their purchase money, to repossess and take back again the merchandise, fixtures and equipment which had been sold to them; that the repossession, if any, taken under the notes executed by

the said alleged seventeen vendees, so far as this respondent can recall, had all been made for some years prior to the death of the said Helene Stern, who knew of such action, waived her rights and made no claim on account thereof. Respondent further says that if any of the repossessed or recaptured articles were sold, they were sold by the defendant corporation, and the proceeds of such sale were received by said corporation and not by him individually. He says that he has never been requested to make any accounting in respect to such repossessed merchandise by his co-executor, Hymen Stern, or the said Celia Stern.

In relation to the claims made by the defendants, Hymen Stern and Celia Stern, upon the promissory notes referred to in said counter and cross-claim, this respondent further says:

106 Helene Stern, the mother of this respondent and the said Hymen Stern and Celia Stern, who was stricken blind for many years, controlled these three children, and because of her condition and their relationship, this plaintiff and the said defendants submitted to the dictates and demands of their mother in relation to the business affairs of the defendant, The Stern Company. At the time of the formation of the partnership that existed prior to the organization of The Stern Company as a corporation, she contributed the sum of \$2,850.00; that sum was the total amount of cash which she ever contributed to the capital of the copartnership or of defendant corporation. At the incorporation of The Stern Company in the year 1925, she insisted upon and was elected President thereof at a weekly salary of \$125.00, and was given a credit for that amount regularly on the books of The Stern Company. This salary was subsequently, on or about the Seventh (7) day of February, 1931, reduced to \$75.00 per week, and a credit of this sum was continued up to the date of her death on the books of the concern.

Although she took no part in the affairs or participated in the conduct of the business of the company, she insisted that all repairs to the house owned and occupied by her at 1411 Hamilton Street, Northwest, Washington, D. C., and the taxes assessed against the same, gas, electric light and telephone bills, and other incidental expenses relating to her house and home be paid by the

Company, directing the bookkeeper to give her
 107 credit for various items as she chose without regard to the management of the Company, and in this manner she obtained large credits on the books of the Company for which, with the payment of comparative small cash amounts, she took over notes received by the Company from its various customers on conditional sales accounts, and by this process she came into the possession of the notes referred to in sub-paragraph (d) of said cross and counter-claim. This respondent further says that the credits for salary and other recited items claimed and allowed to the said Helene Stern were given upon no valid or legal consideration whatsoever. That the said Stern Company is entitled to an accounting from the executors of the estate of the said Helene Stern in respect to what, if anything, is due from her estate to the said corporation because of the herein recited facts and circumstances, and this respondent prays that this reply may be treated as a counter and cross-claim on behalf of and by the defendant, The Stern Company of Washington, D. C., against Hymen Stern and this respondent as executors under the will of the said Helene Stern, and against her estate, and against any claim asserted against the said Stern Company by the defendant, Hymen Stern, and this respondent as such executors, or the said defendant, Celia Stern, against the said Stern Company.

(e) Answering paragraph (e), this defendant says
 108 that the said Celia Stern although residuary legatee under her mother's will, is not at this time the owner of all or any of the notes referred to in the

said counter and cross-claim, nor is she entitled at this time to the rights under said conditional contracts which secure said notes, inasmuch as such notes have not and cannot be distributed as among the assets of said estate until the estate of the said Helene Stern is in a condition for final distribution: that the said Celia Stern may never become possessed thereof and consequently is not entitled to an account because thereof.

(f) Answering subparagraph (f), this respondent says that he is advised by counsel that he is not required to answer the same: in fact, the substance thereof is answered in the foregoing paragraphs of this answer.

(g) Answering subparagraph (g), respondent says that neither he nor the defendant, The Stern Company, has ever been called upon to render any accounts to either Hymen Stern as co-executor or said Celia Stern, and he avers, as hereinbefore set forth, that the said Celia Stern is not entitled to any accounting in respect to the matters set forth in subparagraph (g) for the reasons hereinbefore set forth.

(h) Answering subparagraph (h), this respondent says that the defendant corporation, The Stern Company, or this respondent were never under any legal obligation to deliver to the said Helene Stern or to her
 109 executors any notes in substitution or replacement of any of the notes referred to in the said counter and cross-claim, nor was there ever any demand by the said testatrix in her lifetime or by the said executors so to do.

/s/ Abram E. Stern
 Abram E. Stern

TOBRINER, GRAHAM, BREZ & TOBRINER

by /s/ Thomas Tobriner

Attorney for Respondent
 Suite 932, Southern Building
 Washington, D. C.

District of Columbia, to wit:

I, ABRAM E. STERN, being first duly sworn, on my oath do depose and say that I have read the foregoing Answer by me subscribed and know the contents thereof; that the matters and things therein stated upon my personal knowledge are true, and those stated upon information and belief, I believe to be true.

/s/ Abram E. Stern
Abram E. Stern

Subscribed and sworn to before me this 14th

* * * *

117 Filed Dec 20 1950 Harry M. Hull, Clerk

Referee's Award, Finding of Fact and Conclusion of Law

This is an action filed August 19, 1942, by Abram E. Stern, minority stockholder of the Stern Company, a Delaware corporation, against the corporation and the two remaining shareholders, Hymen Stern and Celia Stern, in which the plaintiff prayed for the appointment of a receiver for the corporation and the transfer of \$12,041.21 held by the three shareholders in their individual names in the National Bank of Washington, which sum plaintiff alleged to be the property of the corporation. The plaintiff also prayed that the property and assets of the corporation be administered and disposed of by the Court, setting forth also that he himself was a creditor of the corporation in the sum of "no less than \$3340.00 for salary or services."

Defendants Hymen Stern and Celia Stern filed a cross claim against the corporation in which they claimed to be creditors of the corporation and a bill for an accounting between the respective shareholders and the corporation.

By stipulation of the parties reference was made to Hymen Goldman, referee, on May 31, 1946, pursuant to Title 16, Section 1701, et seq., of the D. C. Code, "for trial upon all of the issues of law and fact involved in this action."

The history of the proceedings before the referee relates a mass of contradictions and conflicting testimony, not to mention the failure of the books of the corporation to reveal accurately the transactions of the corporation. Previous to the reference many auditors had been employed in an attempt to analyze the books of the corporation and they, almost without exception, confessed to be unable to piece together the financial transactions of the company.

During the hearings, some 44 witnesses were heard, the testimony occupying 19 volumes. Your referee has conscientiously endeavored to wade through this mass of material and put the pieces of this enormous jig-saw puzzle together, and has spent many trying days and sleepless nights in an attempt to attain a complete picture. But this, from the state of the record, is impossible. Too many pieces are missing, many of which could have been supplied, principally by the plaintiff, who exhibited a complete lack of candor or cooperation, refusing to obey the orders of the referee, principally with regard to the collection of notes during the hearings, even though it was made clear that many debtors of the corporation were not paying and their obligations might become outlawed, and also with regard to turning over to the referee or his auditor, Mr. Bernstein, the sums the said plaintiff admittedly had collected, to be kept in trust subject to this award or the final order of a court of last resort.

Witness after witness were subpoenaed and asked
119 to bring their books and records, and time and again they reluctantly appeared with the same ex-

cuse—that their records had either been burned up, lost in moving, misplaced, etc.

Certain conclusions, however, are inescapable, and your referee finds as follows:

Mr. Abram E. Stern was in sole charge of the affairs of the corporation from November, 1940, to March of 1945. Prior to his leaving and in apparent anticipation thereof he removed many of the records of said corporation (see Vol. 3, page 64). These records were removed to his home and kept in the basement and consisted of accounts receivable, notes, conditional sale contracts, etc. (Vol. 3, page 63). Upon being requested, Mr. Stern refused to bring in all of these records and certainly their removal from the offices of the corporation was without any authority.

Application for Receivership

Your referee has conscientiously considered all of the testimony and evidence adduced in this cause and the law involved as advised by his counsel, and he finds that no case has been made out for a receivership. The corporation is a going concern and there is no evidence that assets are being dissipated, mismanagement is taking place, nor does there exist any other element that could persuade a court to appoint a receiver and wind up the business. The application for a receivership, therefore, is denied.

National Bank of Washington Account of \$12,041.21

In the bill of complaint, an application is made and the evidence was that the sum of \$12,041.21 was at one time on deposit in the National Bank of Washington in the name of the three shareholders, and the plaintiff prayed that this sum be transferred to the corporation. It appears, however, from the testimony

adduced at the hearing that this money was used in settlement with the United States Government of one of its claims for deficiency in corporate income tax so that this question is now moot.

Claim of A. E. Stern for Back Pay

The plaintiff, in his complaint, alleged to be a creditor of the corporation in the sum of "no less than \$3340.00 for salary or services." This amount grew to \$7000 (Vol. 1, page 36), several thousand dollars (Vol. 1, page 60), and later to \$36,000 (Vol. 16, page 68). The claim was principally founded on an alleged difference of \$75. per week paid and \$125. per week claimed for a period going back to the year 1930 (Vol. 16, page 67). The principal theory for the claim was that although the plaintiff's salary was reduced to \$75. per week (Vol. 1, page 28), this was done by the company, according to the plaintiff, without authority because it was not in accordance with the by-laws of the corporation although he was present at a meeting and partook of the discussion when the reduced salaries were agreed upon for all of the then officers of the company. It seems fantastic, to say the least, that if the plaintiff claims the amount of \$36,000, he only asked for an amount of no less than \$3340.00 at the time of the filing of the suit, which was sworn to. In checking this claim your referee finds that during the years 1943, 1944 and 1945 the plaintiff actually drew salary at the rate of \$125. per week. Also, he finds a check No. 26,694 written in 1942 for the sum of \$125 covering one week's services and a check No. 27,356 written in 1943 for the sum of \$125 covering one week's services. He

also finds that the claimant received certain credits
121 toward salary, one of which amounted to \$4000
(Vol. 1, page 60) and three certain notes of \$673.70, \$1500, and \$2021 charged to the claimant against accumulated salaries (Vol. 7, pages 26-28).

From all of the evidence adduced, your referee finds that Mr. Abram E. Stern has failed to prove this claim for services and it is denied.

The Claims of A. Edwin Stern, Jr., Frances Koven, Adele Stern, and Hanna Rose Alexander, Also Known As Madame Rose, for Advances—Assignments

All of the above persons appeared before your referee and testified in their own behalf, making claim against the corporation in various sums and practically in every instance the testimony was that they had advanced money to Mr. Abram E. Stern and received checks of the corporation which they held without presenting them for payment. Your referee feels that he is not called upon to decide the validity of these claims, since these persons are not parties to this action and are not included in the reference. Your referee, however, feels constrained to make a finding as to the assignments alleged to have been received by these people, and finds from the evidence that Mr. Abram E. Stern on January 10, 1945, made a number of assignments to himself and the persons enumerated above and then later made a few additional assignments. All of these assignments were made without reference to any other shareholder in the corporation and without submitting the matter to the directors. The referee finds from all of the evidence that there was no authority in law for these assignments and that Mr. Abram E. Stern exceeded his authority. Mr. Stern in his testimony stated that on January 10, 1945, some two months prior to the time that he left the corporation, he made these assignments for the protection of the various individuals and in each instance he assigned paper in amounts greater than the amount alleged to be due the assignee. He attempted to explain this by stating
 122 that the assignees were entitled to a profit. The persons to whom the assignments were made were

people who had allegedly advanced money to the corporation over a period of years, and it is quite noteworthy that these people had never asked or required collateral or security of any nature but that all of a sudden and at a time when Mr. Abram E. Stern was about to leave the company, he, without the request of any of these people and without their knowledge, made the assignments. The bookkeeper who was working for the company, a Mrs. Cohn, did not see these assignments and did not type them (Vol. 17, page 87). Mr. Stern testified that he collected money on the notes assigned and instead of turning this money over to the assignees, he kept it himself (Vol. 18, page 57). While under examination in an effort to glean some information concerning these assignments, Mr. Abram E. Stern was on many occasions vague, indefinite and impertinent.

In further connection with these assignments, it seems clear as shown by the report of the auditor for the referee, attached hereto (see page 8 thereof), that at no time were there any substantial amounts due at the close of the year on the various loan and exchange accounts. As of December 31, 1939, there is a balance shown of \$150. due Mrs. Alexander, and a balance of \$560.03 due Mr. A. E. Stern. As of October 31, 1942 the A. E. Stern account dropped to \$68.42 and the Alexander account showed her owing money to the corporation. This contrasts greatly with the testimony of Mr. A. E. Stern and others as to these accounts at the time he left the corporation.

Referring to the claim and checks of A. Edwin Stern, Jr., who stated there was a little over \$8000 due him, this man testified, "I never loaned the Stern Company money; I lent it to my father. I gave him that money to take care of for me and unfortunately he invested it in the Stern Company." (Vol. 16, page 173).

123 During his examination and cross examination, he stated, (Vol. 16, page 186) that he did not want

the Bureau of Internal Revenue to see the checks involved in this transaction and that his name was not put on the checks for that reason, the idea apparently being that he did not want to pay taxes on his alleged earnings. It also developed that this young man entered the United States Army Air Corps in December of 1941 and at that time had nothing except about \$200. in the bank. His pay computed from December, 1941, through April, 1945, totalled \$9392, and the total checks held by him and made by the Stern Company totalled \$8200. He stated that he kept no record of the amounts advanced by him but at one time he calculated that they came to \$8900 and that the checks were given to him upon his return to this country as security. His explanation for his ability to live on something like \$1200 for a period of 4 years and 5 months was that he won considerable money shooting crap. There is attached a table showing the earnings of this young man and the dates of the various checks written by his father, and it is worthy of note that in March of 1944 when the son had earned a total of \$4742 he was given a company check for \$3000. The following month, April of 1944, when he had earned an additional \$350, he received two more company checks of \$2500 and \$250, respectively, so that his total earnings up to that time amounted to \$5092, whereas the corporation checks given him totalled \$5750. In June, 1944, having earned an additional \$700 for the intervening two months, he was given a corporation check for \$1500. In July of 1944, having earned \$350, he was given a corporation check for \$450, so that we have a situation, as is set forth in the note to the attached statement, where, after the first company check of \$3000, he received checks totalling more than his earnings. The checks given him did not coincide with the amounts he allegedly advanced. The course of dealing and the testimony was such that in the

124 opinion of your referee these alleged transactions never took place. Significance is attached to the

fact that this claimant himself admits a loan to his father and not to the corporation, so that even if he has a claim, it is against his father. It is also noteworthy that the checks were handed to the son after the father had already left the corporation, the date of his separation being March 16, 1945, and the son not returning from overseas until June, 1945.

Because of apparent lack of jurisdiction your referee takes no position on the claims of the persons enumerated above but had he acquired jurisdiction, he would have denied each and every one of them. Your referee also finds that all of the assignments made by Mr. Stern to himself and to these people were invalid and that Mr. Abram Stern is personally responsible and liable to the corporation for all of these notes and conditional contracts of sale, and all collections made thereon, the same being the property of the corporation.

The Claim of Hymen Stern

Hymen Stern testified in his own behalf and made claim for back salaries. The evidence submitted was insufficient and this claim is denied. The evidence further showed that the said Hymen Stern received the sum of \$5000 from the corporation as a loan, which said sum has not been repaid. This loan was made at the time of the sale of some property belonging to the corporation and deposit of the proceeds in the National Bank of Washington. Your referee therefore finds that the said Hymen Stern is indebted to the corporation in the sum of \$5000 and that the corporation have judgment therefor.

The Claims of Celia Stern

Miss Celia Stern, one of the shareholders, testified in her own behalf and made two claims, one for back salary, and one in the sum of \$6700 for merchandise alleged to have been turned over by her to the corporation and for which she never received payment.

The claim for salary was not substantiated and is denied. The claim for reimbursement for merchandise in the sum of \$6700 is allowed and it is the finding of your referee that Celia Stern have judgment against the corporation for the sum of \$6700 for this item.

Moneys Due the Corporation by Abram E. Stern

Your referee finds that Abram E. Stern collected on the various notes and conditional contracts of sale in his possession and belonging to the corporation the sum of \$26,835.40 (Vol. 18, page 57) as of May 13, 1948. He previously had admitted collections of \$20,937.40 as of October 31, 1946, so that the difference represented additional collections between those two dates. The referee, when first learning that Mr. Stern had collected a sum of around \$25,000, ordered Mr. Stern to put this money up with Mr. Bernstein as trustee (Vol. 10, pages 121-2), but this Mr. Stern failed to do. It is possible that Mr. Stern may have collected some additional funds since December, 1947, and an accounting thereof by Mr. Stern is ordered.

In addition to the sum of \$26,835.40 admittedly received as of December 22, 1947, your referee finds Mr. Stern to be indebted further to the corporation as follows:

In Volume 1, pages 68, 72, Mr. Louis Ottenberg, a respected member of this Bar, testified regarding a transaction involving a claim of the corporation in the sum of \$4325, and there is in evidence a check showing this payment, said check bearing the endorsement of Abram E. Stern, and Mr. Stern admitted that he received this money, claiming it as his own and keeping it. It seems that a person was trying to erect a building and obtained a construction loan from the National Savings and Trust Company. This person employed one Sparks as a
 125 contractor and also employed several subcontractors, among whom was the Stern Company. This

person failed to complete the building and gave it up as a bad job, at which time Sparks had \$29,000 due him and the various subcontractors filed mechanics' liens. The Stern Company was one of these, and Mr. Ottenberg represented Sparks in an endeavor to salvage his money. Mr. Ottenberg, on behalf of Sparks, made an arrangement with the owner of the building and the bank whereby his client obtained a deed to the building and the bank turned over the balance of the construction loan for the completion of the same. Sparks completed the building and in order to get rid of the mechanics' lienholders, he gave them second trust notes and among these was the Stern Company, which received a second trust note for \$4325. Mr. Abram E. Stern, in the meantime, made an effort to do something else in connection with collecting the amount due the Stern Company, and entered into some transaction with a man by the name of Friedlander, whereby Friedlander made a lease to someone else in consideration of Mr. Abram E. Stern personally endorsing a note for him. This note went bad and Stern testified that he lost \$2100 in the transaction. He also testified that the second trust note of \$4325 belonging to the corporation had been given him by his mother.

The referee finds that even if this were a fact, it was an invalid gift, since it was not the property of the mother, and it was also without consideration. He further finds that this sum was due to the corporation and having been collected by Mr. A. E. Stern, should be turned over by him. Your referee feels that while acting as agent for the corporation and in the effort to collect the money, Mr. Stern may have lost the sum of \$2100. Your referee is inclined to award this amount to him as an offset and finds that Mr. A. E. Stern owes the company the difference, which amounts to \$2225.

127 In the case of Cunningham and Newman, Mr. Otho Branson, a respected member of this Bar,

testified to the effect that his client and he and another as trustee turned over to Mr. Abram E. a sum totalling \$3198.35 on the insistence of Mr. A. E. Stern that he was the one that was entitled to the money, although the testimony clearly showed that this was due for merchandise purchased from the Stern Company. Mr. Stern in his accounting admitted only the sum of \$922.40, so that there is due the additional sum representing the difference, of \$2275.95. In connection with this matter, see Vol. 12, pages 55, 60 and 64.

In Volume 1, page 73, there is testimony with respect to the Malevetis account where Mr. Stern admitted having received \$1200 for the Stern Company. He stated, however, that for certain reasons he did not put this money in the bank, but spent it all for the company. He was only able, however, to substantiate an expenditure of \$600. for a dishwasher, and the referee finds that the remaining \$600 is still due by Mr. A. E. Stern to the corporation.

The referee further finds, as appears in Volume 3, page 53, that Mr. A. E. Stern collected the sum of \$600.00 from one Israel S. Saslow and deposited the same to the credit of the Abram E. Stern Company. This money was paid for merchandise purchased from the corporation, and your referee finds that since the sum was never turned over, it is still due from Mr. Stern.

Your referee further finds the following sums having been collected but not reported by Mr. Stern and still due the corporation:

Allen Baker, \$100.00

(Vol. 9, page 70)

This was admitted by the brief filed by Mr. Fischer, at page 29.

Maxfield Lund, \$200.00

(Vol. 4, page 14)

This represents a cash payment which was never turned in by Mr. Stern

128 Specifically, then, your referee finds that Mr. Stern owes the company \$32,836.85, as follows:

Collected on conditional notes receivable as of
10/31/46 (Vol. 1, p. 54)

Mischa Bess T/a Balalaika	\$3,000.00	
Thomas Maletes	1,400.00	
“ “	1,400.00	
Koger & Wilson T/A Chicken Paradise	1,035.00	
Robert L. Cunningham	922.40	
T/a Casbah Restaurant		
George Papanikolas T/A Dupont Circle Cafe	2,760.00	
C. Thomas T/A Ideal Sea Food Cafe	765.00	
Clarence W. Westbrook	1,020.00	
Sam Wong, T/A China Clipper	7,175.00	
Herman Susser	1,460.00	\$20,937.40

Additional sums collected on some or all of the above as testified to by Abram E. Stern

(Vol. 18, page 53)	5,898.00
Ottenberg transaction	2,225.00
Cunningham and Newman transaction	2,275.95
Malevetis transaction	600.00
Saslow transaction	600.00
Baker transaction	100.00
Lund transaction	200.00
	\$32,836.35

and the corporation is hereby given judgment against the said Abram E. Stern in the amount of \$32,836.35. In addition to this the referee finds that all of the notes

and conditional contracts of sale now in the possession of Abram E. Stern or any of the persons to whom he made assignments are the property of the corporation and that said notes are to be turned over to said corporation and your said referee does hereby order the said Abram E. Stern to turn said notes over to the proper officers of said Stern Company within five (5) days from the date of the filing of this order, and upon failure so to do, that judgment be entered against the said Abram E. Stern subject to *ex parte* proof as to the damages incurred the corporation by such failure.

129 The referee also finds that any additional sums collected by the said Abram E. Stern or any of the aforesaid assignees over and above the amounts herein set forth are the property of the Stern Company, and it is his order that the said Abram E. Stern turn such sums over to the proper officers of the corporation within five (5) days from the date of the filing of this order, and upon failure so to do, that judgment be entered against the said Abram E. Stern subject to *ex parte* proof as to the damages incurred the corporation by such failure.

The original file is herewith returned to the Court and there is attached hereto the nineteen (19) volumes of testimony taken in this cause, the report of Oscar Bernstein, accountant for the referee, and photostatic copy of the Soslow account, together with paid and cancelled check and the schedule referred to herein involving the claim of A. Edwin Stern, Jr.

A copy of this award has been mailed to counsel this date.

/s/ Illegible signature
Referee

Dated at Washington, D. C. this 19 day of December, 1950.

• • • •

171 Filed Jan 5 1951 Harry M. Hull, Clerk

Plaintiff's Motion to Set Aside Referee's Award

Comes now the plaitniff, ABRAM E. STERN, by his counsel, and respectfully moves this Honorable Court to set aside the award of the Referee, who was appointed by the Court in the above entitled cause, and for reasons therefor states as follows:

1. That the award of the Referee is prejudiced and prompted by bias and undue friendship with the defendants, CELIA E. STERN and HYMEN STERN, during the course of the hearing and up to and including the date of the filing of the said award.

2. That the Referee has exceeded the powers granted to him under Title 16 Section 1701 et seq. of the District of Columbia Code.

3. That he so imperfectly executed his powers that a final award was not made.

4. That he has miscalculated figures.

5. That he has reached conclusions on matters not submitted.

6. That he has failed to follow Rule 53 of the Rules of Civil Procedure.

7. That he has mistaken the law in various instances and has professed to decide upon the law in other instances without authority so to do.

8. And for such other and further reasons as shall be presented to the Court.

BUCKLEY & DANZANSKY

By /s/ Illegible signature
Attorneys for Plaintiff,
1406 G Street, N. W.,
Washington, D. C.

* * * *

173 Filed Feb 8 1951 Harry M. Hull, Clerk

Affidavit of Celia Stern

DISTRICT OF COLUMBIA, to wit:

Celia Stern, being first duly sworn, deposes and says that she is one of the defendants herein and acquainted with the facts herein set forth: that before the Referee in this case was appointed and immediately after the plaintiff herein terminated his connection with the corporate defendant, affiant discovered that the plaintiff had issued checks on the account of the corporate defendant for more money than was on deposit; affiant, acting for and on behalf of the said corporate defendant, borrowed approximately three thousand dollars from the referee herein, in order to meet said overdrafts: that said money was repaid to said Referee by said corporate defendant; that the Referee had made such loans to the corporate defendant many, many times.

That affiant has never given any shirts to the Referee; that during the time, within the past few years, when men's white shirts were scarce and difficult to purchase, affiant had a contact in New York where such shirts could be bought: at the request of the Referee, affiant ordered some shirts for the Referee, who paid for them: that all of the parties to this litigation have been very friendly with the Referee for many years and it
174 was because of such friendship that the parties hereto agreed to the appointment of said Referee and, affiant understood, that it was because of such friendship with all parties that the Referee agreed to act in such capacity without compensation.

That said Referee has visited the premises of the corporate defendant and talked to affiant many times during the hearings in this case for the purpose of trying to

effect a settlement of the differences of the parties hereto; insofar as affiant knows, said Referee was no more friendly with affiant than he was and is with plaintiff.

/s/ Celia Stern
Celia Stern

SUBSCRIBED AND sworn to before me this 8th day of February, 1951.

/s/ Elizabeth M. Mehrling
Notary Public, D. C.

My Commission Expires Feb. 28, 1955.

* * * *

175 Filed Feb 9 1951 Harry M. Hull, Clerk

Affidavit of Referee

DISTRICT OF COLUMBIA, to wit:

Hymen Goldman, having first been duly sworn on oath accordance to law, deposes and says that he was appointed referee by this Honorable Court in the above-captioned cause upon agreement of all parties involved and that subsequent thereto he held hearings extending over a lengthy period; that upon the conclusion of said hearings, he conscientiously weighed all of the testimony and evidence and came to the conclusions set forth in his award.

Your affiant states that during the years 1920 to 1940 he was the next door neighbor of the parties in this litigation on Indiana Avenue, and that in all of this period and since that time, he has been very friendly with all of said parties and has on many occasions helped them and each of them financially; that it was due to this genuine feeling of friendship that he without compensation accepted the job of referee hoping to straighten out this family feud; that he was first approached and asked to take this job by the plaintiff who now charges him with

prejudice, bias and undue friendship, setting forth visits by your affiant to the defendants, a Thirty-five Hundred Dollar (\$3500.00) loan to Celia Stern, and an alleged present of some shirts.

176 Your affiant states that since he left Indiana Avenue and until the present time, as well as now, he has visited most of the merchants including the parties in this litigation, on the north side of Indiana Avenue between Sixth (6) and Seventh (7) Streets every time that he is in that neighborhood and that his visits are purely social and the result of friendships of twenty to thirty years standing: that he did visit the defendants on some occasions during the hearings before him but he never discussed the case except to plead that it should be settled between them, it being a family affair: that similar pleas were made to the plaintiff during this time; that at no time were any of the facts involved talked about and that nothing untoward should or could possibly be attributed to these visits.

Your affiant states that prior to the time he was appointed referee and on the occasion when the plaintiff left the business, he did make a loan, not to Celia Stern, but to the Stern Company of Thirty-five Hundred Dollars (\$3500.00), in order to permit that company to make good many checks which had been issued by the plaintiff just prior to his leaving and which said checks were drawn on insufficient funds: that this loan was made purely out of accommodation in the spirit of friendship with no gain or interest involved and the money was returned to him by the company.

Your affiant does not remember exactly when the shirt incident took place and it consisted of the following: On the occasion of a visit and at a time when it was a little difficult to obtain white shirts, your affiant learned that Miss Stern had succeeded in purchasing some from a

firm in New York. He asked her whether he could get some and she said she would be glad to order some for him from the same New York concern. These shirts arrived in due time and were paid for by your affiant.

/s/ Illegible signature

SUBSCRIBED AND sworn to before me this 8th day of February, 1951.

/s/ E. Paul Perry
Notary Public, D. C.

My Commission Expires Feb. 15, 1955.

* * * *

157 Filed Dec 7 1951 Harry M. Hull, Clerk

Memorandum Opinion

This case arose out of a complaint for receivership, *filed nine years ago* (August 19, 1942). Then followed in quick succession answer, cross-claim and counter-claim,—the not usual concomitants of a family dispute in litigation.

Finally on December 10, 1945 the Court referred the case to the Auditor of the Court, when it came on for pretrial, the terms of the reference being as follows:

“The Auditor shall take such complaint, relevant and admissible evidence and testimony that may be offered by the respective parties in this cause in regard to the issues disclosed by all of the pleadings filed herein, and based upon such aforesaid evidence and testimony the Auditor shall report to this Court his findings of fact and conclusions of law, together with his recommendations, reserving to the respective parties to file such exceptions to the Auditor’s Report as each of the parties herein may be advised”.

This was done. On May 31, 1946 however, the parties stipulated that an order be passed referring the matter to a Referee under the provisions of Title 16, Secs. 1701 etc. D. C. Code 1940. This was done and the Auditor retired from the field (Order of Judge Bailey, May 31, 1946). Under the terms of this latter order a Referee was appointed "with full power and authority . . . to hear and determine the issues of law and fact involved in this cause . . . pursuant to the provisions of law above referred to."

158 The Referee accepted the appointment, filed the necessary qualification and proceeded to act. (June 18, 1946). He it appears was a friend of long standing to all the parties, who not only through counsel but in their proper person acquiesced in his appointment.

As stated, the complaint was for the appointment of a Receiver for the Stern Company of Washington, a Delaware corporation, and was filed by the plaintiff as a stockholder and acting President, and was filed against the Corporation, against the male defendant Stern as stockholder and Treasurer, and the female defendant Stern as one of three in whose name a fund was on deposit in a local bank, which it was alleged was part of the assets and belonged to the defendant corporation as the proceeds of the sale of a portion of its real estate.

Subsequently there were many stipulations entered for enlarging the time for the Referee to file his award, which he finally filed on December 20, 1950. On January 5, 1951 plaintiff filed a motion to set aside the Referee's award upon the following reasons:

(1) That the award of the Referee is prejudiced and prompted by bias and undue friendship with the defendants. . . .

(2) That he had exceeded his powers under the statute, Title 16 D. C. Code.

- (3) That he imperfectly executed his powers.
- (4) That he miscalculated figures.
- (5) That he reached conclusions on matters not submitted.
- (6) That he failed to follow Rule 53 of the Rules of Civil Procedure.
- (7) That he has mistaken the law in various instances and has professed to decide upon the law in other instances without authority so to do.

I find no merit in any of these contentions.

All of the accounting and auditing was done by certified public accountants, and while the statute under which the reference was made does not make it mandatory to furnish the opposition with the preliminary draft of the

findings of fact and conclusions of law I do not
159 find that if Rule 53 FRCP does apply, which this

Court does not decide, that the plaintiff has in any way been prejudiced by the failure to furnish him with such preliminary draft. Report of the Referee is adopted.

Judgment accordingly.

Counsel will prepare proper order.

/s/ Matthew G. McGuire
McGuire, J.

December 7, 1951

* * * *

160 Filed Jan 2 1952 Harry M. Hull, Clerk

Judgment

Upon consideration of the Referee's award, findings of fact and conclusions of law, filed herein on December 20, 1950, and plaintiff's motion to set aside said award, it is by the Court this 2d day of January, 1952,

ORDERED, as follows:

1. That the Referee's award is hereby adopted, ratified and confirmed.

2. That the complaint for receivership be and the same is hereby dismissed.

3. That plaintiff's claim that the sum of \$12,041.21, at one time on deposit in the name of said three shareholders, should be transferred to the corporate defendant, be and the same is hereby denied.

4. That plaintiff's claim against the defendant corporation in the sum of "no less than \$3,340 for salary or services" be and the same is hereby denied.

5. That the claims of A. Edwin Stern, Jr., Frances Koven, Adele Stern, and Hannah Rose Alexander, also known as Madame Rose, for advances and assignments, be and the same are hereby denied.

6. That judgment be entered herein in favor of the defendant corporation and against the defendant Hymen Stern in the sum of Five thousand (\$5,000.00) Dollars.

161 7. That judgment be entered herein in favor of the defendant, Celia Stern and against the defendant corporation in the sum of Sixty-seven hundred (\$6,700.00) Dollars.

8. That judgment be entered herein in favor of the defendant corporation, against the plaintiff, in the sum of \$32,836.35.

9. That all of the said notes and said conditional contracts of sale belonging to the defendant corporation, now in the possession of plaintiff or any of the persons to whom he made assignments, be turned over to the defendant corporation within five days from the date of the signing of this Order, and upon failure so to do,

that judgment be entered against the plaintiff, subject to ex parte proof as to the damages incurred by the defendant corporation by such failure.

10. That any of said additional sums collected by the plaintiff or any of the said assignees, over and above the amount of \$32,836.35, be paid over to the proper officers of the defendant corporation by the plaintiff within five days from the date of the signing of this Order, and upon failure of the plaintiff so to do, that judgment be entered against the plaintiff, subject to ex parte proof as to the damages incurred by the corporation by such failure.

/s/ Matthew G. McGuire
Judge

* * * *

162 Filed Jan 11 1952 Harry M. Hull, Clerk

Notice of Appeal

Notice is hereby given that ABRAM E. STERN, Plaintiff above named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the final judgment entered in this action on January 2, 1952.

/s/ Jerrold Scoutt, Jr.
Jerrold Scoutt, Jr.
Attorney for Plaintiff
Suite 511, Kass Building
711 - 14th Street, N. W.
Washington, D. C.

Vol. I

4 MR. FISHER. Mr. Goldman, let me explain this to you: That was the original caption of the case. Then that same case of Hymen and Celia Stern came back and they filed what they called a cross-complaint, asking for an accounting.

Now the receivership we asked for originally is in abeyance pending the outcome of the hearing of Celia and Hymen Stern's request for an accounting. So we are really trying their request for an accounting and that is the reason why Mr. Levi H. David was to furnish me a statement of what was due Hymen and Celia, due in the accounting, to which I was to make a reply.

* * * *

8 REFEREE GOLDMAN: Before we do that, Mr. Abe Stern, is it agreeable to you that Mr. David L. Blanken shall sit here as my advisor? He has nothing to do with the decision of this case but I invited him simply to guide me in regard to the rules of law and rules of evidence, and so on. Is it agreeable to you?

MR. ABRAM E. STERN: Yes, sir.

9 REFEREE GOLDMAN: Mr. David, have you any objection to Mr. Blanken advising me as I have stated?

MR. DAVID: We have no objection.

* * * *

34 REFEREE GOLDMAN: By agreement of counsel Mr. Blanken, on behalf of the Referee, will be permitted to ask questions of the various witnesses. This will cover not only questions put to Mr. Abram Stern but subsequent witnesses, too, if it is so desired.

MR. DAVID: That is satisfactory to me.

MR. FISHER: It is agreeable to me.

* * * *

85 MR. GANTZ: Mr. Referee, since I have been working on it for some time, I can say that we have all the papers that have been turned over to us. I have spent considerable time at the Stern Company and ransacked the place, from the roof to the basement, in an endeavor to get up all possible evidence. The books as we have them are not a complete check in any way, shape, or form. From statements given us by previous accountants there have always been missing elements; so, therefore, any new data which can be gotten direct and submitted to us will be of great help in piecing together the basis of this puzzle. That is all I have to say.

* * * *

87 *Hymen Stern,*

* * * *

Q Your name is Hymen Stern? A Yes, sir.

* * * *

96 Q When you came back did you find your book-keeping system in such shape that you would know what was going on from the books and records? A The books are mixed up to a certain extent. Some ledger sheets show more balances than what the customers claim they actually owe. Others claim they have paid up in full, but the ledger sheets show they have a balance. Other sheets are not there at all and the customers come in and want to pay on account and we have no record of their account. My sister refers the accounts to my brother and consults him on them or calls on his bookkeeper and tries to get whatever information she can from him. Everything has been left in a complicated condition.

* * * *

Vol. II

7

Hymen Stern.

* * * *

30 Q Since you and your sister have been taking charge of the Stern Company of Washington, have you, or have the two of you, not been operating the Stern Company for the benefit of the Norfolk concern? A Since my sister and I have taken charge of the Stern Company of Washington I have actually been in touch with her about the general conduct of the business, mainly buying and selling merchandise. The records will clearly show that the Stern Company of Washington has greatly increased its profits by my ability to furnish them with merchandise of every description that it is utterly impossible for the Stern Company of Washington to secure. All of this merchandise is forwarded to the Stern Company of Washington by the firm of M. E. Stern of Norfolk at cost. This is very scarce merchandise, which has created a nice profit for the Stern Company.

Q Has the Stern Company supplied the Norfolk concern with any merchandise? A The Stern Company has supplied the Norfolk concern with merchandise that they cannot sell up here and the accounts are paid
31 back and forth and conducted in a businesslike way.

Q And at what price has the Stern Company sold to the Norfolk Company? A Actual cost of the merchandise.

Q Actual cost? A Yes, sir.

Q And does Miss Celia Stern travel and purchase merchandise in New York, Philadelphia, and other places for the Norfolk concern? A No.

Q You are sure of that? A She has on occasion picked up something she could not use and called me up, and I told her I could not use it. Occasionally she would

run into something I could use and I would tell her I would buy it if she could not handle it.

Q Hasn't she made trips for the Norfolk company and put the expenses on the Stern Company of Washington?

A She made trips and charged it to the M. E. Stern Company, which our records will show.

Q And she has never charged it to the Washington company? A If she has made trips for the Washington company, she has charged for them.

Q The trips she has made for the M. E. Stern
32 Company of Norfolk, have any of those expenses been charged to the Stern Company of Washington?

A The trips are mainly for the benefit of the Stern Company of Washington.

Q I know what they are mainly for. Has she ever made charges against the Stern Company of Washington for trips which she has made for and on behalf of the Stern Company of Norfolk? A No.

Q You are certain of that? A I am positive.

Q You said that you had never taken any notes or other claims from the Stern Company of Washington. What about the Finkel notes and the Michey's Restaurant notes? A Those notes were taken by me and charged against my account on the ledger.

Q Don't you know, as a matter of fact, that you took those notes out and collected and never made an accounting to the Stern Company of Washington? A Mrs. White received the record on those notes and they were charged to my account. I think if the records are available they will show it.

* * * *

54

Celia E. Stern,

* * * *

70 Q Miss Stern, with respect to the money that
71 was collected for the Stern Company— A (inter-
posing). Yes.

Q (continuing.) You say it was deposited, that all of that money was deposited to the credit of the Stern Company? A Not at the beginning because there were checks coming through and I was afraid, because Mr. Abe Stern had drawn these checks on the company. There were these outstanding checks and he would cash them on the company, and it was in my name and it was by the advice of my attorney. He can answer it better than I. My books are all there and in order. Then, too, Miss Cohn was there for fifteen months: she handled them and not me. All those records are there, Mr. Fischer, and those records are all right there.

Q Miss Stern, when you took charge of the business moneys collected by you for the benefit of the Stern Company were deposited to your personal account? Is that right? A That is right.

Q And they were for quite a long while? A Well, until we got straightened out with the bank: that is right.

* * * *

72 A That is right: for fifteen months, until it was turned over to the Stern Company account, and I did not make out a check. I would not handle it. I knew this would come up, knowing this would come up.

Q You did draw checks on your personal account? A I have a right to.

* * * *

Q But you did deposit this money to the credit of your personal account? A Yes, that is right.

73 Q You did draw checks on your personal account? A That is right.

Q For your own benefit? A The Stern Company did not have any money at the time.

What do you mean when you ask me, did I draw on the Stern Company from my personal account, or did I draw on mine? Which did you mean? Make it clear.

Q I would like to do so but I cannot get it to you. You had a personal account in the National Bank of Washington? A That is right.

Q The moneys you received for the benefit of the Stern Company you deposited to that personal account of yours in the National Bank of Washington? A That is right.

Q You drew checks on your personal account for your own use did you not? A My money was in there.

Q You comingled your money with this account? A That is right.

* * * *

80 Q Don't you know how much money you were required to advance to the Stern Company? A No, I do not. Miss Cohn can tell you that because she handled my bank account. I did not even touch it. She made up the checks, took my deposits over, and I was never in the bank during that time. I was very careful what was done and as far as I know, if there was any mistake it was her doing.

* * * *

87 Q Have you ever seen a record which shows that the M. E. Stern Company of Norfolk owes the Stern Company of Washington any money? A I have not seen any such record.

Q Do you know there was any such record? A May I answer the last question?

Q Yes. A The M. E. Stern Company had a sheet, Expense Norfolk, and paid; but it was mixed up, like everything else was mixed up, and there was never a correct ledger sheet and that was the trouble between my brother Max and my brother Abram, and both claimed the other one owed money; and my brother claimed my brother Max owed the Stern Company. That is the ledger sheet of my brother, and from that time we have no recollection and we are not responsible.

Q What has become of that ledger sheet? A I do not know; I had nothing to do with it.

Q You have had nothing to do with it? A No, sir; I have never seen it.

* * *

S9A Q There was one time you stepped out from the company? A That is right.

Q From the Stern Company of Washington? A That is right.

Q What was the reason you walked out there? A The reason was that I went to my mother and it was agreeable. Mr. Stern called your building the Acme Sales Company, which was the—

* * *

90 Q What happened to the store? A The store went back under Abram E. Stern. I asked Hymen to take the stock to Norfolk. He said he did not want to take the stock. He said: "You will fight with me and say I took the store." And then he said: "Give it to him"—and I gave it to him and I never got the money for it.

91 Q How much money did you have in it? A Something over \$5,000; I do not know exactly what it was.

* * *

92 Q At the time you came back and took possession of the business you said you found a lot of checks were issued and came to the bank and there was not sufficient funds to meet them? A That is right.

Q What did you do to make those checks good? A I came to you and borrowed \$3,500. Isn't that right? Then I had a bank account. My brother would send me \$125 a week; and that is how I made the accounts good and none of them came back.

* * *

93 Q And what was the amount of merchandise you turned over? A Something over \$5,000; Mrs.

94 White was there and can tell you.

Q You turned over approximately \$5,000 of merchandise of the Acme Company to the Stern Company of Washington? A That is right.

Q Did it all belong to you? A It certainly did, my personal money.

Q Have you ever been paid anything on account of it? A Not a cent; no.

* * * *

Vol. III

17 Q Mr. Shinn, will you state your full name and office address and your profession? A Earl W. Shinn, 640 Shoreham Building, Attorney.

* * * *

21 Q From an examination of the records could you get a complete history of the transactions covering these three years from the books of the Stern Company? A No.

Q Well, what was the trouble? A Some of the records were missing.

* * * *

39 Q What did Mr. Strom say was wrong? A That papers were missing and there were duplications in accounts, and various things of that kind.

Q What do you mean by "duplications"? A Duplications; entries made twice, or something of that kind.

Q Do you mean that was poor bookkeeping? A Yes.

Q Who was handling the books at that time? A I don't remember the name; some lady.

* * * *

60 *Philip Pear,*

* * * *

Q What is your full name and residence, Mr. Pear?
A Philip Pear, 1650 Harvard Street, Northwest.

* * * *

61 Q Engaged to do what and by whom? A Well, we were engaged by Mr. Stern.

Q Which Mr. Stern? A Mr. Abram E. Stern, who was vice-president of the Stern Company of Washington, on Indiana Avenue, to primarily examine the books and records and also see if we could not settle the 62 1944, 1943, and 1942 corporate income taxes and the accompanying data such as excess profits and the District corporate tax.

Q Well, did you adjust it? A I beg your pardon.

Q Was it adjusted? A No, sir; we never completed our work.

Q Why. A Primarily because after three or four intensive efforts to audit the books and records, we never felt that the results were complete nor were they of such a nature that we could prepare tax returns which would be proper to offer before the Internal Revenue.

Q What was the trouble? A Well, the trouble was primarily dating back, I suppose, from the inception of the corporation. Proper books and records were never kept, and also we felt we never had all the data available.

Vol. V

22 MR. FISCHER: May I have an exception?

REFEREE GOLDMAN: Exception noted.

MR. FISCHER: It is supposed to be an impartial hearing and they are supposed to put up their side without assistance from anybody.

MR. BLANKEN: This is not only an impartial hearing but we want to find out what the truth is in this matter. There have been certain charges made. It seems the only way to get at it is to look at the whole record and not half the record.

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Vol. VI

32

Julius Sinker,

* * *

Q Mr. Sinker, what is your full name? A Julius Sinker.

* * *

35 Q What did you try to examine? A The records.

Q The records at what time? A Subsequent to the time when I left.

Q 1939? A Probably so.

Q Describe, as far as you can. A All I can say is I went down again. I asked for them. I went back and they were not the same records I had before. I took the records worked on by subsequent men, whoever they were, and tried to match what I had with what I did before, but I could not make a connection.

Q Why not? A The records were not there.

Q There were no records indicating the transaction?
A I wanted to start with my old records and go on but I could not.

* * *

42 Q You say you could not tie it in. Was it the different system set up or was it because of a lack of proper records being kept? A Well I found general accounts, which never occurred before, and I could not trace them down. In other words, the figures there did not match up as they should. I did not have enough information to go back and check up.

Q Can you give me an illustration? A Well, take some records of receipts of a certain balance. There should be a continuous record up to date. I am not so sure that particular account was different. It might be accounts payable or notes or rent account or money ac-

count. My recollection is I could not make any headway at all.

Q Was that because of anything that was done as a result of anything being crooked? A I do not know. I could not answer that question.

Q Would you say there was a lack of proper book-keeping? A Yes, improper bookkeeping would cause it. I do not know.

* * * *

57 *William James Orr*

* * * *

58 Q Beginning with what year did you compile that data? A In 1945.

MR. FISCHER: In 1945?

THE WITNESS: 1945.

BY MR. DAVID:

Q Did you go back of that? A No, here are books prior to that, but the books are very unusual.

Q The books are what? A Very unusual. I have one ledger, that is all. That covers 1939, 1940, 1941, and 1942.

Q And the books are unusual? A Yes, sir; the records are very incomplete.

* * * *

73 Q Give dates when you call out items. A June 30, 1941, July 31, August 30, September 30.

Q What are the amounts?

MR. FISCHER: I think those records speak for themselves.

MR. BLANKEN: Suppose you introduce the records. They will speak for themselves. There is no point in reading them.

MR. DAVID: Except there is a claim made running back for years.

Do you deny he got any salary?

MR. FISCHER: No, he drew on salary but he did not draw all that was coming during the time and he will show it.

MR. DAVID: We will see about it.

THE WITNESS: I have the record book for 1938, 1939, 1940, 1941, 1942, and 1943. I have the payroll book here which will show it.

In the Loan-Exchange Account, Abram E. Stern, I do not find any charges at all; a number of credits, commissions. The notes, though, do not seem to be charged against him.

Q What notes are you referring to? A Well he had a note of Sarah M. Kent and W. E. Jamish.

* * * *

Vol. VII

66

Celia Stern,

* * * *

68 Q Do you owe the Stern Company anything?

A Oh, no. I was not paid for my stock of goods taken over.

Q How much were they worth? A My merchandise taken over was worth about \$6,700, less than it cost me. I also gave my last \$800 to \$900 in the bank and never got it back when I left.

* * * *

69 Q Where did you put the merchandise? A It was down at Mr. Goldman's old place, his old store.

Q You had a business there? A That is right; I drew money out of the business and went in business for myself.

Q How much merchandise did you have? A About \$6,700 of merchandise.

Q You never got paid? A Never a penny; he sold it.

Q Who? A Abe Stern.

* * * *

Vol. X

111 *Abram E. Stern,*

* * * *

119 REFEREE GOLDMAN: Gentlemen, we are trying to get these figures so that we will know what we are doing.

Mr. Stern, you have been in business for a long time, and without my questioning your veracity—

MR. STERN (interposing) I hope not.

REFEREE GOLDMAN (continuing) I still feel that when you took all those notes away, you certainly must have made some record as to the amount of the balance on each note. You cannot tell me. I have a perfect right to make up my mind: the way I feel, you cannot tell me you took a certain amount of notes without knowing how much each one of those persons owed on those notes, and made settlements. This settlement did
120 not depend on Meletis's own record that all he owed was \$3,000.

You certainly must have known from the records you took with you how much he paid, because those notes amounted to \$11,000, and when you settled for \$3,000 you must have had some idea how much the balance was on those notes?

Now I am going to ask you and your attorney, that you produce any records that you have concerning these notes, when you took them.

* * * *

123 REFEREE GOLDMAN: Mr. Fischer, you don't deny this money is the property of the Stern Com-

pany of Washington and Abram E. Stern is merely the trustee, a self-elected trustee?

MR. FISCHER: I do not agree with your statement.

* * * *

125 REFEREE GOLDMAN: On several occasions we have asked Mr. Stern what disposition he has made of these collections, whether or not he kept the money; and if not what he has done with it. That information has never been supplied, so we have to assume he has kept it.

* * * *

Vol. XI

7 *Statement of Abram E. Stern, Plaintiff*

MR. STERN: Mr. Referee, last week when I was here, I made the statement off the record that I was about ready to throw this whole thing up, and it was only out of respect for you, taking your time and trouble, that I even came over here. I spent a year and a half, and so did you, on this case, and got nowhere. My time is very valuable. It costs me an awful lot of money to come over here and spend a day every week.

I don't mind coming over if there was any reason whatever. When we started this, we thought we could expedite it and get through in a few weeks. That was my understanding.

You asked me if I had any objections to your acting as Referee, and although I thought you were more friendly to the other side, I was perfectly willing to abide by your decision. I still am. As it goes on it looks like you are more one-sided every day.

Now I am brought up here with a motion which was first suggested by Mr. Blanken, who I understood when
8 he was taken in was in an advisory capacity to you, as far as the legal end of it. He has interrogated several witnesses, which I did not think was right,

as that is what Mr. David is getting paid for; and if he (Mr. David) does not know enough about it to do it, I think it ought to be dropped.

They now come along with a motion for me to put up \$25,000 or more that I have admitted getting for people that it belonged to.

As it goes along it gets worse. You admitted the statement at the last meeting that I was a minority stockholder. This isn't even a corporation. It never was a corporation, and I doubt whether it ever will be a corporation, for these reasons: They called two meetings to throw me out. The one meeting was when the court granted the right to transfer; and the other was on the first Monday in January, 1946, and I was ousted as the vice-president. They could not oust me before that, so they had to wait until that time, and Mr. David was very careful to put it on the second and notified me by registered mail.

The year 1947 has passed and the year 1948 has passed. Now the by-laws of that corporation, if there are such, specifically state that there must be one annual meeting and it must be held at a certain time in the month of January. For the past two years there has been no such meeting.

9 MR. DAVID: I object to that because it is irrelevant and incompetent.

MR. STERN: I knew that "irrelevant" was coming in here.

MR. DAVID: This is a voluntary statement which has nothing to do with this account.

REFEREE GOLDMAN: Objection sustained.

* * * *

Vol. XII

41

Celia Stern,

45 BY MR. FISCHER:

Q Miss Stern, may I ask you this question?

Did you examine the receipt books of the Stern Company to see whether or not any payments were made by the Ferdinand All Steak Company? A Nothing showed up in the books.

Q You looked through the receipt books? A Yes; I will look all of them up; I looked most of them up and there is nothing in there.

Q It is entered in the receipt book? A Not as far as I know.

Q Did you examine the receipt books from 1941 on through 1945? A I looked through most of them and there was nothing in them. I will have to go through thoroughly again but I did not see anything as far as I looked.

Q You saw none of those payments? A None of these dates.

* * * *

Vol. XIII

62

Celia Stern,

* * * *

Q Miss Stern, are there any records of the Stern Company on Indiana Avenue with reference to the account of Jesse Johnson? A There were no ledger sheets in there when I came in, none at all, and I called Mr. Johnson and he came in to buy a couple of signs from me and I said, "Mr. Johnson, how much equipment did we put in your place?" Mr. Kahn and everybody told me of the equipment that was put in when the place

was set up, and Mr. Kahn said: "Miss Celia, Jesse Johnson owes an awful lot of money here."

* * * *

63 Q Have you been able to find any record of any kind in the office of the Stern Company showing an account with Jesse Johnson for merchandise furnished by the Stern Company Indiana Avenue store? A Only today, I have now looked through another sheet. I have found where the Perfect Upholstery Company had sent a bill in for the Jesse Johnson job.

Q How much did it amount to? A I put it aside and I cannot remember where I put it. I put these in the office to bring down and, incidentally, after that work by them I found some other papers from Jesse Johnson's job, and today I have one picked for Jesse Johnson for another amount; and then I found—you have that paper there from the Air Duct people.

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Vol. XIV

2

William J. Orr,

* * * *

7 Q What do you mean by that? A There was nothing to indicate on the check stub the amount or the persons to whom the checks were drawn.

Q The three checks covered by this one? A
8 There was nothing to indicate what they were for.

Q But there was one entry made in the book for \$1,100 which covered those three checks? A That is right.

Q Are those three checks listed there? A No, sir; the checks were not there and the stubs were blank.

Q Where did you get the \$1,100 as shown on your sheet there? A The check was issued for \$1,100 with

an explanation that it covered these three checks. There is no way of checking out whether it should be \$1,100 or what.

REFEREE GOLDMAN: There is nothing wrong with the amount? This \$1,100, you say that check covered these three checks?

THE WITNESS: Yes, sir.

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Vol. XV

69 MR. FISCHER: Did you actually go to trial?

MR. DAVID: I object unless he shows the conviction.

REFEREE GOLDMAN: Don't answer questions as fast as they are asked. Think about it. You have a certain amount of personal privilege here.

MR. BLANKEN: Give your counsel time to object.

* * * *

70 REFEREE GOLDMAN: Go ahead and ask the
question. Now I want to direct the witness not to
71 answer until his counsel can interpose an objection,
if he wishes.

* * * *

92 *Celia Stern,*

* * * *

95 BY MR. FISCHER:

Q Did you make a note how much money was collected from Mr. Johnson? A Not yet.

Q Is there any reason why you haven't done it? A Yes.

Q What is the reason? A Because I haven't time to look at all these things and run the business. The sheets will be there. I just did not have time to look them up even if he paid.

Q Are you trying to collect from Mr. Johnson? A How can I find out when you have the records?

Q Does the man admit it? A Yes, sir; the man who was in here and testified, he promised to get the records and says he was a friend of Abe's and a friend of mine, and same as Cannady; and Mr. Stern had been good to him and he wasn't going to do anything about it.

96 *Re-Examination by Counsel for the Defendants*

BY MR. DAVID:

Q I show you some records relating to the Lynnhaven Restaurant, 621 Pennsylvania Avenue. Where did they come from? A I found some of these records in the files, when looking through the files. Some are from the files and some are on the floor and in boxes, and in looking through them I came across these (indicating).

Q Are there any ledger sheets? A I have no ledger sheets at all.

* * * *

97 Q Could you ever get it straightened out? A Never: I had no records. He said he would like to have it straightened out. I would like to see it straightened out, and that is all I know. I have no records.

* * * *

105 *Hymen Stern,*

* * * *

119 *Celia Stern,*

* * * *

129 MR. BLANKEN: The notes are here and the list is here. Do you wish to compare the notes with the list, Mr. Fischer?

MR. FISCHER: If it means anything I would like to compare them. I am objecting to it being offered in evidence at the present time.

MR. BLANKEN: I think that objection is sustained until Mr. Fischer has a right to compare the list with the notes to see that it is a correct list.

REFEREE GOLDMAN: Why don't you offer the notes in evidence?

MR. DAVID: I offer the notes in evidence.

REFEREE GOLDMAN: Let the list be admitted, provided it covers all the notes introduced in evidence; otherwise we would have to take the notes and make up another list again.

* * * *

MR. BLANKEN: For the sake of the record, counsel should stipulate in regard to this list.

MR. FISCHER: It is already in the record, marked "Celia Stern, Exhibit No. 1."

MR. BLANKEN: I want you to stipulate that is the correct list and that the items shown are correct.

MR. DAVID: The bank made this up.

MR. FISCHER: We stipulate this list, marked "Celia Stern, No. 1," is the correct list of notes which were turned over by the American Security and Trust Company to the executors, who in turn turned those notes over to Miss Celia Stern.

* * * *

138 MR. BLANKEN: Are we interested in the ones you control, personal property?

THE WITNESS: Yes.

REFEREE GOLDMAN: Are we interested in her own property; how much she collected and what she did with it?

THE WITNESS: He wants to know about the rest of them.

MR. BLANKEN: I am asking Mr. David.

REFEREE GOLDMAN: It seems to me what you are trying to bring out, Mr. David—see if I am correct: These notes that she got from the executors—what she collected on them I don't think is any of our business. It is those which she could not collect on which somebody else got the money, or the notes were not any good.

* * * *

MR. DAVID: What I want to know from the other side is, in respect to the recapture of merchandise under these notes.

MR. BLANKEN: That is not before us now. There is no evidence on that. There is nothing before us now on that and you can elicit that information from Mr. Stern later.

* * * *

139 MR. BLANKEN: Mr. David, the point is that you have brought out from the witness that she has no recaptures and has no way of discovering any recaptures, so it seems you have exhausted the subject.

* * * *

144 MR. BLANKEN: It is all in evidence and we will read what the record shows. There is no use in arguing about it.

* * * *

145 MR. BLANKEN: If there was such an inference, that is no proof. I cannot see any reason to go through note by note to find out what Celia collected on her own property.

* * * *

180 *Hymen Stern*

* * * *

185 Q Mr. Stern, did you ever make a statement in the presence of Mr. Gelfand, Mr. Blackman, Mr. Goldman, and Celia Stern, that the Stern Company was

bankrupt and Abe Stern could have your stock? A That necessitates a great deal of explanation.

Q Well did you ever make such a statement.

MR. BLANKEN: Counsel hasn't objected, but the objection is sustained.

MR. DAVID: It is immaterial.

MR. FISCHER: There is testimony in the case which has quite a bearing on this.

REFEREE GOLDMAN: That was several years before the mother died. Are you trying to prove a gift?

MR. FISCHER: I am trying to prove the condition of the company.

REFEREE GOLDMAN: Off the record.

(Discussion off the record.)

THE WITNESS: I would like to answer the question but I would like to ask you to give me permission
186 to go back a little further and I will lead up to your question.

MR. FISCHER: I have no objection to your qualifying your answer.

THE WITNESS: The question will be answered, at the time I lead up to it and not before.

REFEREE GOLDMAN: Do you object to the question?

MR. DAVID: I object on the ground it is immaterial.

REFEREE GOLDMAN: Objection sustained.

* * * *

195 Q When you made these loans, did you give them by cash or by check? A Sometimes with cash, sometimes with check. Most of the loans were made through Mrs. White, who was the bookkeeper at that time. My loans were made and no record was made of it.

* * * *

* * * *

209 Q Hoy many checks did you sign to make good checks that had been sent out by your brother before you took charge, with no money in the bank to pay them? A I could not tell you how many.

Q About how many thousands of dollars? A I don't remember any more.

Q Approximately how much? A I could not say any more.

Q Were those checks coming back? A Yes.

Q How did you reorganize and take care of them?
A I borrowed money from Mr. Goldman.

Q How much did you borrow? A \$3,000, wasn't it?.

210 Q You answer. A \$3,000, I think it was; I don't have the checks.

* * * *

215 Q Was Abram E. Stern ever apprised of the financial condition of the company since you and Hymen took over? A Why no.

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Vol. 16

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15 MR. BLANKEN: Mr. Fischer, I might say that all this was gone over about three times before.

MR. FISCHER: Not by me.

MR. BLANKEN: Br. Mr. Abram E. Stern. My recollection is he testified either at the first or the second hearing and set forth all the details of the arrangements he had with the mother.

16 MR. FISCHER: I don't recall he ever testified to that.

MR. DAVID: I submit to the Referee, the books are here of the account of Mrs. Stern. Why should he testify at random and according to recollection when the books are here?

MR. BLANKEN: He hasn't testified specifically but as to a general course of dealing, and I understand the mother advanced moneys for notes, and when notes were paid you gave others in exchange.

REFEREE GOLDMAN: I do not recall notes being given to your mother without her paying for them. I don't recall the mother getting notes without paying for them. This is all new testimony, and Mr. Fischer is presenting it for what it is worth.

* * * *

18 MR. BLANKEN: Are you going to drop that subject, Mr. Fischer? I think it requires following up.

* * * *

25 Q Did you talk to Dany Frese, Joseph Sklagan, or Ida Stewart in regard to their payment of those notes?

MR. DAVID: I object to hearsay evidence. Let him bring the witnesses here.

MR. FISCHER: I am merely asking if he had a talk with them.

MR. BLANKEN: He can say he spoke to them. It will not do any good. Mr. David will object when you want him to repeat the conversations.

* * * *

89 MR. BLANKEN: Is the ruling of the Referee that these notes are to be held in the custody of Mr. Bernstein pending adjudication as to whom they belong, and that in the interim both Mr. Abram E. Stern and Miss Celia Stern may instruct the makers of the notes that collections due on the notes be turned over to Mr. Bernstein.

* * * *

Vol. XVII

8

Vivian Cohn.

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9 MR. BLANKEN: Mr. Fischer, might I suggest at this point that these questions are very leading. Suppose you let the witness testify.

* * * *

24 MR. DAVID: I object. It is leading and suggestive.

MR. BLANKEN: The witness made no such statement. The objection is sustained.

* * * *

25 MR. DAVID: I object.

REFEREE GOLDMAN: Objection sustained.

MR. FISCHER: Why?

MR. DAVID: Mr. Stern must have told her.

MR. FISCHER: If she knows of her own knowledge.

MR. BLANKEN: Mr. Fischer, I am surprised at your asking the question. It is very leading and assumes a lot of things to which the witness has not testified heretofore.

MR. FISCHER: I am asking her if she had any knowledge of it.

MR. BLANKEN: You can ask her if she has any knowledge of it but not tell her of it and expect a yes-or-no answer.

* * * *

28 MR. FISCHER: Mr. David never made any objections until after you said it is ruled out.

MR. DAVID: I beg your pardon. The record will otherwise show.

MR. BLANKEN: Even if it were true, for the sake of the record we would still sustain an objection which should have been made: because the Referee intends to

conduct this hearing properly, according to the rules of evidence.

* * * *

29 MR. BLANKEN: That is exactly the basis of the ruling. The testimony is he left a list and she testified she saw the list and the list will speak for itself.

REFEREE GOLDMAN: Let us proceed in an orderly manner.

* * * *

68 MR. BLANKEN: My understanding of this is that Mr. David wanted a bill of particulars to support his suit and he called Mrs. Cohn, and she in turn called Abram E. Stern and obtained the information from him, and somehow the information was transmitted to Mr. David.

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Vol. XVIII

12 MR. BLANKEN: So far, Mr. Fischer, the questioning is premature. We do not know what he is leading up to. We do not know what harm is done. Proceed.

REFEREE GOLDMAN: Objection overruled.

* * * *

Vol. XIX

1 Monday, April 18, 1949.

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67 The hearing is concluded.

Mrs. Hazel White,

a witness, was called for examination by Counsel for the Defendants; and, having been duly sworn by Mr. Blanken, was examined and testified as follows:

* * * *

137 Q As the bookkeeper of the company? A Yes.

Q Now do you remember the discussion between Abram E. Stern and his brother Hymen Stern about this Stantovedes quarrel? A No, I do not know that they ever discussed it in my presence.

Q When did you learn of the existence of a check of \$4,325, of which that is a photostat? A I think the day I signed an affidavit.

Q You never saw it before? A No.

Q You never saw the original? A No, sir.

Q Do you know anything about Mr. Abram E. Stern kiting checks with any members of the family while you were there?

MR. FISCHER: May I ask that that be stricken from the record? It was other than kiting checks.

THE WITNESS: Well, they exchanged checks: that is what I call it.

BY MR. DAVID:

Q What do you mean by that? A We exchanged checks with various people.

138 Q Did you ever exchange checks with members of his family, with members of Abram E. Stern's family? A With Mrs. Stern.

Q His wife? A Yes.

Q I want you to tell the Referee what you know about it. A I could not tell how many: sometimes it was done every day.

Q What was the procedure? A He would usually call her. Mr. Stern would call Mrs. Stern, and he would

ask her for a check for \$100, \$200, \$300, up to \$500, and we would send a check up and deposit a check which she would send down. She would hold our checks.

Q What kind of a check would you send? A The Stern Company check, which was the only ones around.

Q Would it be equal to the amount you got from her? A Yes.

Q How often was that done? A Sometimes it was done every day.

Q I want you to say whether or not every time you got a check from his wife you gave her a check on the Stern Company? A If he did not send a check up, because sometimes she sent a check back, I would
139 make out a check immediately and give it to Mr. Stern for his wife.

REFEREE GOLDMAN: Would the checks clear through the bank at the end of the month?

THE WITNESS: No; when I left there she was holding a large number of checks and the bank account, there was a bank reconciliation there and I kept it from month to month and it was there when I left, and that would show a true statement.

BY MR. DAVID:

Q Did any checks signed by the Stern Company to his wife clear? A Yes, sometimes they would clear. They did not always clear but when they were put in the bank sometimes they did not clear, and on a few cases I re-sent checks up when the check was returned to her bank.

Q How often did that occur? A Not too many times; I could not remember.

Q How did you arrange to get the cash money to Mrs. Stern? A I don't remember.

Q Would you take it up? A No, we usually had a messenger take it up, some one who worked around the store; I don't remember even that.

Q Do you remember working for the Stern Company when Mr. Bernard Goldstein was working there? A Yes, I do.

Q Do you know how long you were there while he was there in the store? A No, sir.

Q Some months? More or less? A Some months.

Q Did you ever put a check of the Stern Company, signed by Mr. Abram E. Stern, in a sealed envelope and give it to Mr. Bernard Goldstein to take to Mr. Stern's wife? A Yes, I have done that; I think most of the time I would put them in an envelope.

Q You put the actual checks in an envelope, checks signed by Abram E. Stern? A Yes.

Q They would be Stern Company checks? A Yes.

Q He signed all the checks? A Yes, because at the time I am speaking of he was the only one there.

Q What statement, if any, have you got to make, or have you any knowledge as to the procedure when Abram E. Stern would borrow money for the Stern Company from anybody else except his wife? A Well, we always gave a check. If I remember correctly, we gave a
141 check if we borrowed from Mr. Goldman or Mr. Malcolm down the street.

Q Did any member of the family of Abram E. Stern loan money to the company? A Miss Stern.

Q Who? A Miss Celia Stern.

Q And did she get a check in exchange if she loaned money? A I don't remember. I remember once she loaned \$900, but I don't remember what we gave her for it, if anything.

Q Did Abram E. Stern's son ever loan money to the business? A No.

Q Never? A Not while I was there.

Q What I want to know is, did any other member of the family of Abram Stern except Mrs. Stern, that is Mrs. Abram E. Stern, loan any money? A I could not say; I do not know.

Q Did you have a ledger account with Mr. Stern's wife? A Yes, I did.

Q Was it a loose-leaf ledger? A Yes, because we used the bookkeeping machine to post the accounts.

* * * *

200

Mrs. Hazel White,

* * * *

202

Vol. XVI

Examination By Counsel For the Defendants

BY MR. DAVID:

Q I will ask you to look at the ledger of the Stern Company and tell me if the account in this ledger is in your handwriting? A Yes, sir.

Q You made those entries in that ledger? A Yes, sir.

Q I notice that your system was to indicate the amount of the check received from Mrs. Alexander and then the payments back to her or checks. Is that correct? A Yes, sir.

Q Now did you go up to her personally and get any checks from her? A Well no, I don't believe I ever went up there; I don't remember going up there myself. We sent various people up, a clerk in the store.

Q And her check would come back and be put in the book? Is that right? A Yes, sir.

* * * *

8

Vol. XVII

Vivian Cohn,

* * * *

Re-Examination by Counsel for the Plaintiff

BY MR. FISCHER:

Q Mrs. Cohn, you testified before? A Yes, sir.

Q And you were the bookkeeper of the Stern Company for a while? Is that correct? A Yes, sir.

Q While you were bookkeeper for the Stern Company, were you acquainted with any moneys that were loaned by either H. Rose Alexander, Madame Rose, Mrs. Koven, A. Edwin Stern, or Mrs. Nachman to the Stern Company? A Yes.

* * * *

34 Q Mrs. Cohn, when did you go to work for the Stern Company? A In 1944.

Q And what were your duties? A Bookkeeper.

* * * *

93 Q Mrs. White, you were with the Stern Company as bookkeeper for what time? A From 1935 to April, 1942.

Q And did you then leave and come back? A Yes, I was away for a year, a year and a half, or two years. I think I left in 1939 and I guess I came back in 1941; I don't remember that.

* * * *

100 Q Well, what about the salary checks to Abram E. Stern? Did he get his money every week? A No.

Q What was generally the case? A Well, in fact, while I was there they were not getting their money. They took notes. That is to say they got it from customers' notes. There was not money to pay the men in the shop and employees.

Q Did Abram E. Stern take notes of the company in payment of salary? A Yes.

Q How often did that happen? A I would not know how often it happened.

Q Would the records of the company show it? A Yes.

Q Show the bills of sale he took for salary? A Yes.

Q Did you make the entry? A Yes, I made all the entries while I was there.

Q Is that in the Abram E. Stern account of the company? A It should be.

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Abram E. Stern.

* * * *

195 Q Mr. Stern, I have a series of checks issued by the Stern Company to Madame Rose or Mrs. Rose Alexander for a period of time running from 1938 through 1942, together with attached checks signed by Rose Alexander, Sadie Nachman, and Madame Rose, H. Rose Alexander, etc.; and explain what those checks are. A Those are checks of the Stern Company that were given to Madame Rose, Mrs. H. Rose Alexander, Sadie Nachman, in payment for checks that they gave the Stern Company, and each one is attached, show that they have been paid and that they are not a liability of the Stern Company.

Q In other words you borrowed money for the
196 Stern Company as per the checks and the checks are attached to the checks of the Stern Company?

A That is right. Their checks are all made payable to the Stern Company and were deposited in the bank in the circulating account. Each and every one shows the stamp. In lots of cases we had to take them in to Mr. Goldman and had them cashed before we deposited them in the bank.

Q I show you another batch of checks of the Stern Company. Attached to them are checks of Rose Alexander, Sadie Rose Nachman, and Hannah Rose Alexander, President and Treasurer respectively, and checks by

Madame Rose, on various banks in the District of Columbia, including the Washington Loan and Trust Company, the Hamilton National Bank, and the Columbia National Bank, and ask if you will kindly identify those checks and state what they were for. A These were for checks given by Hannah Rose Alexander, Mrs. Sadie Nachman, and Madame Rose to the Stern Company. They were deposited to the credit of the Stern Company. Some of them here, I notice, are payable to "Cash" and endorsed by Frances Koven and marked that they are "to repay a loan that we made to Abe Stern," and signed to H. Rose Alexander.

Q Do they all represent moneys loaned to the Stern Company? A They represent money that was advanced to the Stern Company.

Q Advanced to the Stern Company by these various people? A That is right, and they have been paid.

Q And they have been paid? A Yes, sir.

Q Was that a series of transactions that ran over a period of years, that is shown by those checks from 1937 on? A I think from 1936.

Q In other words, your testimony would be to the effect that you borrowed money for the Stern Company from them over a long period of time, running from approximately 1936? A That is right.

Q In continuous transactions? A That is right; almost nine years.

Q And you continued up to 1945? A That is right.

MR. FISCHER: I offer both of these batches of checks in evidence as "Plaintiff's Exhibit, Abram E. Stern, No. 15."

MR. DAVID: My objection goes to these checks also.

REFEREE GOLDMAN: The checks will be received in evidence and ruled upon later on as to their admissibility.

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145 Filed Jan 26 1951 Harry M. Hull, Clerk

*Supplements To Points and Authorities In Support of
Motion To Set Aside Referee's Report*

Comes now the plaintiff by his counsel and files herewith the following supplemental Points and Authorities in support of plaintiff's motion to set aside the referee's report.

In support of the charge of prejudice as shown in plaintiff's paragraph numbered one (1) of his motion, the following is respectfully submitted:

- (a) Affidavit of Vivian Cohn.
- (b) Affidavit of Irvin M. Hayman.
- (c) Affidavit of Louis T. Hayman.
- (d) Failure to consider approximately Three Thousand Five Hundred Dollars (\$3,500.00) worth of notes taken by Hymen Stern (Vol. 2 page 9).
- (e) Failure to consider One Thousand Dollars (\$1,000.00) worth of equipment taken by Hymen Stern for restaurant (Vol. 1 page 100).
- (f) Failure to consider notes taken by Celia Stern as substitutes for worthless notes received by her from her mother's estate (Vol. 1 pages 60-66 and Vol. 2 page 64).
- (g) Failure to require Hymen Stern and Celia Stern to account for the notes taken by them (Vol. 2 page 5).
- (h) Failure to require Hymen and Celia Stern
146 to submit statement of transactions of Stern Company since March, 1945, (Vol. 2 page 3).
- (i) Loan made by referee to Celia Stern of Three Thousand Five Hundred Dollars (\$3,500.00) (Vol. 1 page 69 and Vol. 2 page 92).

(j) Failure to require Celia Stern to account for funds of the Stern Company which were intermingled with her personal account (Vol. 2 page 95-6).

(k) Award of Six Thousand Seven Hundred Dollars (\$6,700.00) to Celia Stern as against her vague testimony of Five Thousand Dollars (\$5,000.00) invested (Vol. 2 page 91-8).

(l) Finding against Abe Stern of Two Thousand Two Hundred Twenty-five Dollars (\$2,225.00) in connection with the Ottenberg-Sparks-Friedlander transaction which occurred several years prior to 1940 when, as a matter of fact and on record, the referee stated that he would go into no transactions prior to the year 1940 (Vol. 11 page 25).

(m) Failure to make any ruling with respect to more than Thirty Thousand Dollars (\$30,000.00) taken by Hymen Stern under the disguise of salaries since March 1945.

(n) Failure to return assigned notes and conditional bills of sale to assignees to whom said notes were assigned for loans made to the Stern Company, notwithstanding that said notes were presented by the said assignees to the referee, at his request, for the purpose of exhibiting them as evidence of their claims against the Stern Company but with the understanding that they would be returned to the assignees after they had served the referee's purpose (August 19, 1945 letter and testimony of assignees).

In support of the charge that the referee has exceeded the powers granted to him under Title 16 Section 1701 et seq. of the D. C. Code. Referee exceeded his powers by demanding that moneys collected on the notes
 147 and conditional sales contracts held by the assignees be turned over to him or to his auditor (Mr. Bern-

stein) to be kept in trust subject to the referee's award or final order of the Court.

These assignments were made to secure money loaned by the assignees to the Stern Company. This type of operation had been practiced by all of the members of the corporation and there had been a continuous acquiescence of this method since the inception of the corporation.

See Woodward v. Melligen 19 App. D.C. 550.

Adams v. Collier 73 Fed. 2d 975.

Salem Iron Works v. Lake Superior Mines 112 Fed. 229.

Jensen v. Toltec 174 Fed. 86.

Finding by referee that no case had been made out for "receivership". (Page 3 of referee's award). This cause of action was referred to the referee for the purpose of stating an account between the plaintiff and the Stern Company, Hymen and Celia Stern. The referee was not clothed with authority to determine whether or not a receiver should be appointed for the Stern Company.

Finding by the referee that all of the notes and conditional sales contracts either in the possession of Abram E. Stern or the persons to whom they were assigned were the property of the corporation and that said notes, etc., are to be turned over to said corporation together with the further order of the referee that said notes be turned over to the proper officers of the corporation within five days and upon failure so to do that judgment be entered against him subject to ex parte proof as to damages incurred to the corporation by such failure.

Findings by the referee that the assignments were made without reference to other share holders and without submitting the matter to the Board of Directors and the fur-

ther finding of the referee that there was no author-
148 ity in law for these assignments and that A. E.
Stern exceeded his authority.

Finding by referee that "because of apparent lack of jurisdiction your referee takes no position on the claims of the persons to whom the notes were assigned but that if he had acquired jurisdiction he would have denied each and every one of them and the further finding that all of the assignments were invalid and that Abram E. Stern is personally responsible and liable to the corporation for these notes and conditional sales contracts and all collections made thereupon, the same being the property of the corporation".

Finding of referee that any additional sums collected by A. E. Stern or any of the aforesaid assignees over and above the amounts set forth in the referee's report, are the property of the Stern Company and his order that said A. E. Stern turn said sums over to the proper officers of the corporation within five days and upon failure so to do that judgment be entered against A. E. Stern subject to ex parte proof as to damages.

With respect to paragraph three (3) of plaintiff's motion, it is respectfully submitted that from all of the above and other mistakes apparent upon the record, the referee has imperfectly executed his powers so that a final award has not been made.

With reference to point four (4) of plaintiff's motion, it is respectfully submitted that the referee has miscalculated figures as follows:

(a) In connection with the Malevetis note (Vol. 1 page 73 et seq) the amount of the payment on this note was One Thousand Two Hundred Dollars (\$1,200.00) which represents the balance due thereon. The testimony shows that out of said One Thousand Two Hundred Dollars

(\$1,200.00) Abram E. Stern spent Six Hundred Dollars (\$600.00) for a dishwasher and Six Hundred Dollars (\$600.00) was used to pay the rent due on the factory building on Q Street, N. E., to E. P. Schwartz & Co.; said factory building being a part of the business of the Stern Company. Therefore, a finding against Abram E. Stern of Six Hundred Dollars (\$600.00) was an error on the part of the referee. The evidence further discloses that the reason the money was not deposited in the bank account of the Stern Company was because of attachments being levied against the Stern Company bank account at that time.

(b) In re Maxfield Lund (Vol. 4 page 14) there is no testimony to show any cash payment of Two Hundred Dollars (\$200.00) to Abram E. Stern that was not deposited to the credit of the Stern Company. On page 14 of Vol. 4 it also shows that the said Two Hundred Dollars (\$200.00) was deposited to the credit of the Stern Company account and on page 15 the testimony of Abram E. Stern showed that "there is a cash book that will show the Two Hundred Dollars (\$200.00) payment."

(c) Re Mischa Bess Three Thousand Dollars (\$3,000.00) this note was assigned to Abram E. Stern for moneys due him by the Stern Company as shown on plaintiff's Exhibit No. 2 and incorporated in the letter of August 19th, 1945 to Levi David in which said letter the following notation was made "the above mentioned assigned conditional sales contracts and notes are the property of the persons named as assignees and consequently are not the property of the Stern Company".

(d) The Meletis notes (two in number showing balance of One Thousand Four Hundred Dollars (\$1,400.00) due on each) were assigned to Hannah E. Alexander. See plaintiff's Exhibit No. 2 and letter of August 19, 1945.

(e) Karger A. Wilson, conditional sales contract, balance due thereon One Thousand Thirty-five Dollars (\$1,035.00) was assigned to Abram E. Stern. See plaintiff's Exhibit No. 2 and letter of August 19th.

(f) Robert L. Cunningham, conditional sales contract, balance due Nine Hundred Twenty-two and 40/100 Dollars (\$920.40) was assigned to A. Edward Stern, Jr. See plaintiff's Exhibit No. 2 and letter of August 19, 1945.

(g) Chuancey Thomas, conditional sales contract, balance due Seven Hundred Sixty-five Dollars (\$765.00) assigned to A. E. Stern. See plaintiff's Exhibit No. 2 and letter of August 19, 1945.

(h) Clarence W. Westbrook, conditional sales contract, balance due One Thousand Twenty Dollars (\$1,020.00) was assigned to Hannah R. Alexander. See plaintiff's Exhibit No. 2 and letter of August 19, 1945.

(i) George Papanikolas, conditional sales contract, balance due Two Thousand Seven Hundred Sixty Dollars (\$2,760.00) assigned to A. E. Stern. See plaintiff's Exhibit No. 2 and letter of August 19th.

(j) Herman Susser, note, balance due One Thousand Four Hundred Sixty Dollars (\$1,460.00) assigned to A. E. Stern. See plaintiff's Exhibit No. 2 and letter of August 19th.

Additional sums collected on some or all of the above as testified by A. E. Stern (Vol. 18 page 53) in the amount of Five Thousand Eight Hundred Ninety-eight Dollars (\$5,898.00) represented collections made on the assigned notes and conditional sales contracts which were turned over to the parties to whom said notes were assigned and in some instances loaned back to Abram E. Stern by the said assignees for the purpose of aiding him

in the conduct of his own business after he left the Stern Company.

With reference to point five (5) of the plaintiff's motion, it is alleged that the referee reached conclusions on matters not submitted, and in this connection it is again respectfully called to the Court's attention that the referee was not clothed with any authority to reach a conclusion concerning the right to the appointment of
151 a receiver for the business of the corporation.

The referee failed to follow Rule 53 of the Rules of Civil Procedure in that he failed to furnish counsel for all parties a draft of his report before the filing of his award.

With reference to point seven (7) wherein it is charged that the referee has mistaken the law in various instances and has professed to decide upon the law in other instances without authority so to do, it is respectfully submitted that the referee's decision as to the right of the plaintiff to assign notes and conditional sales contracts for money loaned to the corporation is not in accord with the generally accepted decisions. The powers of officers and managing agents of a corporation may be extended by practice on their part and continued acquiescence on the part of others so as to bind the corporation. The referee's decision is also against the general principal of law that managing officer of a corporation have prima facie power to do any act which the Directors could authorize or ratify. And it is further submitted that his decision in other instances (without authority so to do) is indicated by his decision to the effect that no evidence was produced to show the necessity for the appointment of a receiver and his attempted ruling to the effect that no receiver shall be appointed.

With respect to point eight (8) of plaintiff's motion it is respectfully submitted that the referee's statement

that the plaintiff has failed to produce all of the records which were in his possession is not in accord with the record. There is no cause or reason for his assertion that the plaintiff has failed to cooperate by turning over all of the records to the referee. This is borne out by exhibits filed by the plaintiff wherein all records in his possession including the assigned notes to others were turned over to the referee at the request of the said referee and all other records were left with the Stern

152 Company at the time Abram E. Stern was forced to leave the Stern Company (See testimony of Abram E. Stern and the testimony of Vivian Cohn to the effect that books and records were left with the Stern Company when Abram E. Stern was forced to leave).

It is further respectfully submitted that the referee's conclusions concerning the salaries due Abram E. Stern for services rendered to the company over the period from the date it was agreed to accept Seventy-five Dollars (\$75.00) a week as salary until such time as the corporation could again pay One Hundred Twenty-five Dollars (\$125.00) and repay the difference between the Seventy-five Dollars (\$75.00) and the One Hundred Twenty-five Dollars (\$125.00) which the By-Laws of the corporation authorized was entirely wrong. The testimony indicated that because of the fact the corporation did not have sufficient cash to continue the payment of salary at the rate of One Hundred Twenty-five Dollars (\$125.00), it was agreed that until such time as the corporation shall have again built up its cash account, that only Seventy-five Dollars (\$75.00) per week should be drawn and that the balance due in accordance with the By-Laws of the corporation would be paid at a time when the business was financially able so to do.

It is further denied that the evidence discloses that Abram E. Stern drew One Hundred Twenty-five Dollars (\$125.00) weekly in cash for a number of years while he

was managing the business. The books reflect certain notes turned over to A. E. Stern in lieu of salary but a vast number of these notes were no good and in other instances moneys due by the makers of said notes were paid directly to the Stern Company. In this connection the accountant's memorandum to the referee states in effect that he could not certify to the correctness of his conclusions in connection with the Abram E. Stern account yet nevertheless the referee has taken it upon himself to reach a definite conclusion thereon.

153 In connection with the referee's conclusions concerning the claim of A. Edwin Stern, Jr., it is very significant to note that the referee has gone to great length in an effort to analyze the testimony of A. Edwin Stern, Jr., and has dwelt upon the reasonableness of his ability to advance the moneys to the corporation which he testified had been so advanced. The testimony was to the effect that he forwarded the money to his father which he knew was being invested with the Stern Company to aid his father in maintaining the business. The fact that the checks were not handed to the son until after his return in June of 1945 is not a matter that is as "note worthy" as the referee would have the Court believe for the reason that the son was abroad in the U. S. Army and had left all matters of his personal affairs with his father during said absence. That circumstance is certainly not unusual and we venture the suggestion that if the referee's son had been placed in the same situation he, the referee, would do the same thing for his own son.

Respectfully submitted,

BUCKLEY & DANZANSKY

By /s/ Illegible signature

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